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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 521

STEAMSHIP "ANSALDO SAN GIORGIO I", SOCIETA NAZIONALE DI NAVIGAZIONE, CLAIMANT, PETITIONER,

vs.

THE RHEINSTROM BROTHERS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 7, 1934.

CERTIORARI GRANTED DECEMBER 3, 1934.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

RHEINSTROM BROTHERS COMPANY, Libellant,

against

Steamship "ANSALDO SAN GIORGIO I," SOCIETA NAZIONALE NAVIGAZIONE, Claimant

DOCKET ENTRIES

1922

Mar. 1. Filed libel and stipulation for costs.
Mar. 7. Filed claim and stipulation for costs.
June 5. Filed stipulation for value.
Nov. 13. Filed answer.
Nov. 14. Filed note of issue and notice of trial.

1923

July 3. Filed order substituting Loomis & Reubush.
Oct. 30. Filed answer to interrogatories.

1925

July 16. Filed order for commission to Naples, Italy.
July 23. Filed interrogatories.
Aug. 1. Filed order for commission to Naples, Italy.
Aug. 1. Filed order for commission to Genoa, Italy.
Aug. 5. Filed cross-interrogatories to E. & V. Tervoli.

[fol. 2]

Aug. 21. Filed re-direct-interrogatories to V. Tervoli.
Aug. 21. Filed re-direct-interrogatories to E. Tervoli.
Sept. 5. Filed stipulation extending time of claimant to file cross-interrogatories.
Sept. 15. Also to except to re-direct-interrogatories.
Oct. 16. Filed cross-interrogatories (M. Bosco).
Oct. 16. Filed cross-interrogatories (Crosa Giacomo).
Oct. 24. Filed interrogatories (G. Bagurio).
Oct. 24. Filed interrogatories (M. Bosco).
Oct. 24. Filed interrogatories (O. Imbronta).
Oct. 24. Filed interrogatories (A. Benini).
Oct. 24. Filed interrogatories (F. Criscuolo).

1925

Oct. 24. Filed interrogatories (C. Giacomo).
Oct. 24. Filed interrogatories (M. Razetto).
Oct. 26. Filed stipulation settling interrogatories of E. & V. Tervoli.
Oct. 26. Issued commissions to Naples, Italy.
Oct. 26. Filed stipulation settling interrogatories of "Martino Rogeto et al."
Oct. 26. Issued commission to Genoa, Italy.
Oct. 26. Filed stipulation settling interrogatories to "Francesco Criscuolo et al."
Oct. 26. Issued commission to Naples, Italy.
Dec. 17. Filed commissions from Naples, Italy.

1926

May 6. Filed commissions from Genoa, Italy.

1927

Sept. 26. Filed order permitting libellant to withdraw commissions (Naples and Genoa, Italy) from Court files—Thacher, J.
Oct. 4. Winslow, J.—Case tried. Libellant—one witness and 7 exhibits—adjourned to Oct. 5.
[fol. 3] Oct. 5. Winslow, J.—trial resumed. Libellant—six witnesses. Argued and submitted.
Oct. 10. Winslow, J.—decree for libellant.
Oct. 20. Filed interlocutory decree with reference to John E. Morrissey—Winslow, J.
Oct. 21. Filed affidavit in opposition to form of interlocutory decree.
Nov. 9. Filed order and notice allowing appeals from interlocutory decree—Mack, J.
Nov. 9. Filed assignment of errors.
Nov. 9. Filed bond on appeal—approved (Nat. Sur. Co.).
Nov. 15. Filed order extending time to file record on appeal to Dec. 20, 1927 (Clerk).
Dec. 21. Filed order extending time to file record on appeal to Jan. 20, 1928 (Clerk).

1928

Jan. 10. Filed order extending time to file record on appeal to Jan. 31, 1928 (Clerk).
Feb. 4. Issued certificate on appeal to C. C. A.
June 20. Filed mandate from C. C. A. Decree affirmed with costs in C. C. A. taxed at $25.00. Refer to John E. Morrissey, Commissioner—Winslow, J.

1927
1929

Feb. 13. Filed order for commission to Rome, Italy—Knox, J.
Feb. 15. Filed interrogatories to A. Kiefer.
Feb. 15. Filed interrogatories to U. Gasperini.
Feb. 28. Filed cross-interrogatories to U. Gasperini.
Feb. 28. Filed cross-interrogatories to A. Kiefer.
Mar. 5. Filed stipulation setting interrogatories.
Mar. 5. Issued commission to Rome, Italy.
[fol. 4] May 7. Filed commission from Rome, Italy.
May 16. Filed order permitting Bigham, Englar, Jones & Houston to withdraw commission (Rome, Italy) from Court files—Bondy, J.

1930

Nov. 28. Filed deposition of Rudolph Johnson, San Francisco, Cal.
Dec. 23. Filed order to remove deposition of R. Johnson—Woolsey, J.

1931

Oct. 26. Filed notice of motion to propound interrogatories. Memorandum endorsed. Motion granted—Bondy, J.
Oct. 31. Filed order granting motion to propound interrogatories—Bondy, J.
Dec. 8. Filed answers to interrogatories.

1932

Oct. 18. Filed commission's report—Minutes, exhibits and interrogatories.
Oct. 22. Filed exceptions to commissioner's report.
Dec. 23. Filed note of issue—motion to overrule exceptions returnable Dec. 27, 1932.

1933

Jan. 30. Filed notice of motion for order overruling exceptions to Commissioner's report.
Jan. 30. Filed opinion #7624, Patterson, J. Exceptions to the measure of damages sustained. Other exceptions over-ruled.
Feb. 23. Filed order over-ruling exceptions 4, 5. 6, 7 and 8 to Commissioner's report, sustaining exceptions 1, 2, 3 to report. Parties to submit memoranda of damages—Patterson, J.
Mar. 14. Filed report of commissioner.
Mar. 14. Filed stipulation fixing damages at 16,488 lira.

1933

[fol. 5] Mar. 14. Filed stipulation fixing damages at 200 pounds or $789.50 and cancelling previous stipulation.

Mar. 14. Filed memorandum #7674—Patterson, J.—libel dismissed without costs.

Mar. 23. Filed order dismissing libel without costs. Commissioner's fee fixed at $1500.—Patterson, J.

April 10. Filed note of issue—motion for additional security returnable April 14.

April 14. Filed notice of motion for an order directing claimant to file additional stipulation for costs in amount of $2000.00—motion denied without prejudice—Bondy, J.

June 1. Filed petition and order allowing appeal—Coxe, J.

June 1. Filed assignment of errors.

June 5. Filed undertaking for costs on appeal $250.—Indemnity Ins. Co. of N. A.

June 23. Filed order extending time to file record to August 23, 1933.

June 30. Filed additional docket fees.

[fol. 6] In United States Circuit Court of Appeals for the Second Circuit

No. 82-357

Rheinstrom Brothers Company, Libellant,

against

Steamship "Ansaldo San Giorgio I," Societa Nazionale Navigazione, Claimant

Stipulation re Printing of Transcript of Record

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto that the printing of the transcript of record, filed in the Clerk's office of this Court by the claimant herein on its appeal from the interlocutory decree entered by the libellant upon the decision of the District Court holding the claimant liable for the amount of libellant's damages, which transcript of record was offered by the libellant as an exhibit in the proceedings

before the Special Commissioner appointed to ascertain the amount of libellant's damages, may be omitted from the transcript of record to be filed on the present appeal, and that the said transcript of record on the first appeal may be handed to the Court upon the argument of the pending appeal, and that counsel for either party may in their briefs, or upon the argument of the pending appeal refer [fol. 7] to any matter contained in the record on the first appeal in this case.

Dated, New York, July 14, 1933.

Bigham, Englar, Jones & Houston, Proctors for Libellant. Loomis & Ruebush, Proctors for Claimant.

The foregoing stipulation is hereby approved and ordered filed.

Manton, United States Circuit Judge.

[fol. 8] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Hearing Before Commissioner Held December 23, 1930

Before John E. Morrissey, Esq., Commissioner.

Hearing held at the office of the Commissioner, 90 West Street, New York City, 3:45 P. M., December 23, 1930.

APPEARANCES

John E. Morrissey, Esq., Commissioner.

Bigham, Englar, Jones & Houston, Esqs., F. H. Prem, Esq., Counsel, for the Libellant.

Loomis & Ruebush, Esqs., P. A. Donohue, Esq., Counsel, for the Claimant.

OFFERS IN EVIDENCE

Mr. Prem: I offer in evidence the depositions of August Kiefer and Umberto Gasperini, together with the Commission's stipulation settling interrogatories, and order for the issuance of the Commission, together with the envelope

[fol. 9] returning depositions from the American Consul at Rome, showing that they were filed in the United States District Court on May 7, 1929.

Mr. Donohue: I offer in evidence the cross-interrogatories of August Kiefer and Umberto Gasperini.

Commissioner: Received and marked Libellant's Exhibit No. 1.

Mr. Prem: I offer in evidence the deposition of Rudolph G. Johnson.

Mr. Donohue: I offer in evidence the cross-examination in the deposition of Rudolph G. Johnson.

Commissioner: Received and marked Libellant's Exhibit No. 2.

It is stipulated that the depositions of the two witnesses, August Kiefer and Umberto Gasperini, were returned by the American Consul and filed in the United States District Court for the Southern District of New York on May 7, 1929.

Mr. Prem: I also offer in evidence the testimony of all of libellant's witnesses as contained in the transcript of record of this case filed in the United States Circuit Court of Appeals for the Second Circuit, together with the seven (7) libellant's exhibits referred to in said record.

Mr. Donohue: I offer the cross-examination of those witnesses.

Commissioner: Received and marked Libellant's Exhibit No. 3.

Mr. Prem: I also offer three consular invoices—invoice numbers appearing on the back thereof being Nos. 526, 1312, 1503.

[fol. 10] It is stipulated between counsel that libellant's exhibit, consisting of photostatic copies of three consular invoices, may be received in evidence with the same force and effect as though the originals had been subpœnaed from the files of the United States Custom House, and that photostatic copies may be used in lieu of the originals, and are true copies of the consular invoices on file at the Custom House.

Commissioner: Received and marked Libellant's Exhibit No. 4.

It is stipulated and agreed that October 22, 1928 is the date that claimant's petition for certiorari was denied in the United States Supreme Court.

Mr. Donohue: I wish to put in an objection to Claimant's Exhibit 3, consisting of invoices shown in the printed record. I object to their introduction because they contain a lot of statements by someone, possibly the shipper. They are unsworn and we have had no opportunity to cross-examine as to what is stated in them. I object to the introduction of them in so far as any reliance may be placed on the truth of what they contain. I also object to the photostatic copies of the consular invoices on the same ground.

Mr. Prem: I wish to point out that the objection now made by Mr. Donohue was also made by Mr. Loomis on the trial in the District Court, and the Court at that time stated, at page 42:

"I will reserve decision on the motion; and in the mean-[fol. 11] time, they may be marked and received in evidence, subject to the objection and possible exclusion by the Court."

The Court thereafter made no further rulings and they were accordingly accepted as evidence. These exhibits were made a part of the printed record which was considered by the Court of Appeals on claimant's appeal in this case.

Mr. Donohue: As to that I would like to point out that possibly the Court received the exhibits referred to on the basis specified in the objection by Mr. Loomis, in that specifically, the objection to their introduction in so far as any reliance might be placed upon the truth of what they contain.

Commissioner: When do you wish to file briefs?

Counsel agree that briefs are to be filed and exchanged by both parties by February 15, 1931, and reply briefs to be filed and exchanged by March 1, 1931.

It is stipulated that the dates appearing in the statement contained in the record on appeal, are true and correct and the aforesaid statement is made a part of the record in this proceeding.

Mr. Prem: I offer in evidence the Libel and Answer contained in Libellant's Exhibit No. 3.

Mr. Donohue: No objection.

Commissioner: Received.

[fol. 12] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Hearing Before Commissioner, Held December 7, 1931

December 7, 1931—2:30 P. M.

OFFERS IN EVIDENCE

Commissioner: A motion was made before me to re-open the case in order to put in additional evidence and motion was granted. Then an application was made by the libellant to the District Court for leave to serve certain interrogatories, which motion was granted after submission of briefs and argument. Interrogatories have been served upon respondent and respondent has since filed its answers to those interrogatories.

Mr. Prem: I wish to offer in evidence the notice of motion, the order of the Court on the motion, and the answers of the claimant to libellant's interrogatories.

Mr. Donohue: Objection. This hearing was reopened to give libellant opportunity to prove that notice of survey was given. These papers have nothing to do with any notice of survey. At most they are only mere notices of [fol. 13] claim and therefore are immaterial on that issue of notice of survey.

Commissioner: Received.

Mr. Donohue: Exception.

CARL GELLER, a witness called on behalf of the Libellant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Prem:

Q. What is your full name, Mr. Geller?

A. Carl Geller.

Q. What is your occupation?

A. Translator.

Q. How long have you been engaged in that occupation?

A. 30 years.

Q. What has been your training and study with respect to the Italian language?

A. I learned it in school. I learned it afterward for myself, travelling in Italy, and have translated it for the last thirty years, and have been engaged as translator by the firms of Chubb & Son and Appleton & Cox.

Q. Are you familiar with commercial terms?

A. I am.

Q. I show you three documents and ask you to state what they are.

A. Those are invoices.

Q. Are they translations of invoices which I now show you, being Exhibit 7?

A. Yes, that is the translation of that one.

Q. They are all marked Exhibit 7. There are three invoices.

A. That is the translation of this one. Yes, and that is the translation of this one.

Q. Are those translations correctly made from the original exhibits which I now show you?

A. Yes, sir.

Mr. Prem: I offer them in evidence.

Mr. Donohue: There is no objection.

[fol. 14] Commissioner: That is a photostatic copy of the original. Received.

Mr. Prem: That is all Mr. Geller. Thank you.

Mr. Prem: It is stipulated and agreed by and between counsel that the rate of exchange prevailing on September 2, 1920 was .04665, the date September 2, 1920 being the date of the arrival of the vessel at the port of Philadelphia, and that this rate of exchange shall be used by the Commissioner for computing damages, unless the Claimant submits further proof of the rate of exchange satisfactory to the Commissioner.

Mr. Donohue: Objection. That ties me up completely.

Mr. Prem: The rate of exchange on July 5, 1920 was .0615 and for September 2, 1920, .04665.

Commissioner: Your contention is that I should use the invoice value as of the date of the failure to deliver.

Mr. Donohue: I withdraw that. I agree to the invoice value as of the date of shipment. I want to get proof as to what they did with the shipment. He can't recover for damages and keep the value of the remnant too. We are entitled to a deduction as to any amount that they have saved. Thus far you haven't anything before you as to the proof of the damage, except the mere appraisals of percentages stated by Johnson, the surveyor. I want to get the evidence as to exactly what they did with the shipment.

Mr. Prem: I will tell you if it is any value to you.

Mr. Donohue: All right, what did they do with it?

Mr. Prem: They used it themselves.

(Hearing adjourned to January 8, 1932.)

[fol. 15] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Hearing Held Before Commissioner, January 26, 1932

Hearing held at the office of the Special Commissioner, No. 90 West Street, New York City, January 26, 1932.

Before John E. Morrissey, Esq., Special Commissioner.

APPEARANCES

John E. Morrissey, Esq., Special Commissioner.

Messrs. Bigham, Englar, Jones & Houston (Mr. Prem), for the Libellant.

Messrs. Loomis, Williams & Donohue (Mr. Donahue), for the Claimant.

It is stipulated that the testimony may be taken by a stenographer, signing, filing and certification being waived, stenographer's fees to be taxable.

[fol. 16] JOHN E. DEREDON, being duly sworn and examined as a witness for the libellant, testified as follows:

By Mr. Prem:

Q. What business are you in?
A. I am in the importing business.
Q. Importing what kind of commodities?
A. Importing fancy groceries and fruits in brine.
Q. How long have you been engaged in that business?
A. About eighteen years.
Q. What firm were you connected with in August and September, 1920?
A. I was connected with Ricardo Gomez & Dietlin Company of this city.
Q. Are they in business at the present time?
A. No, they are not in business now.
Q. When did they cease doing business?
A. Well, they became inactive in 1923, I believe—1922 or 1923.
Q. What was your connection with that firm?
A. I was Secretary and Treasurer of the company.
Q. With what firm are you connected at the present time?
A. John E. deRedon, Inc.
Q. Are they engaged in the same business?
A. The same business.
Q. How many importers were there of cherries in brine in August and September, 1920, in New York City?

Mr. Donahue: I object to that unless the witness's knowledge is shown.

The Commissioner: He can name the concerns that he knows.

Q. What concerns do you know that were in business importing cherries in brine at that time?
[fol. 17] A. Well, you mean the number of them or just the names of them?
Q. The names of them.
A. At that time, there was the American Trading Company, Antolini & Company—that is all I remember of actual importers.
Q. Can you give us an idea of the volume of business done by your firm in August and September, 1920?
A. You mean in dollars and cents?
Q. No, in number of barrels imported and sold.
A. You mean cherries alone?

Q. Cherries in brine, yes.

A. I think we handled about 10,000 barrels that year.

The Commissioner: Were there other concerns engaged in the importing business other than those you have named?

The Witness: Yes, there were a number of agents—foreign representatives—but not importers—not to my recollection.

Q. Can you give us an idea how your firm ranked with others with respect to the volume of business handled in barrels of cherries in brine?

Mr. Donahue: Objected to unless the witness has some means of checking.

Objection sustained.

Q. Do you know the volume of business transacted by the other firms which you referred to?

A. Yes, I think they did between——

Mr. Donahue: I object to that.

(Question repeated.)

A. About 15,000 barrels.

[fol. 18] Q. You were one of their competitors, were you not?

A. We were.

Q. The business that you transacted ranged along the Atlantic Seaboard, that is you didn't sell exclusively in New York City?

A. Oh, no, we sold to the manufacturers distributed throughout the country—Chicago, Peoria——

Q. Does that include Philadelphia?

A. Philadelphia; Cincinnati; Covington, Kentucky; Boston.

Q. I show you three invoices, and ask you if you are familiar with the commodities referred to there (handing witness translations of Libellant's Exhibit 7, consisting of three invoices).

A. Yes, they all refer to cherries in brine, the commodity I have been handling.

Q. Did you sell that commodity during the year 1920?

A. I did.

Q. Have you made any search for your records of sales in the year 1920, August and September, of the firm you were connected with at that time?

A. Well, of course, I didn't have access to those records.

Q. I say, have you made a search for them?

A. I say I didn't have access to them—to the records of Rheinstrom Brothers Company?

Q. Yes, that is of the sales made during that time.

A. Yes.

Q. Have you found any records of sales?

A. No.

Q. Have you any recollection of the sales prices prevailing in August and September, 1920, for cherries in brine imported from Italy?

A. Yes, I remember selling cherries at around 10 cents a pound.

Q. Was there any trade journal or other publication giving quotations of the market price of cherries in brine?

A. No, not cherries in brine. It is a very limited com-

[fol. 19] modity, and the transactions are limited.

Q. What factors did you take into consideration in establishing a selling price for cherries in brine in New York City, as an importer—I am referring now to August and September, 1920?

A. Still back in 1920?

Q. Yes.

A. We take the invoice value, cost of merchandise, freight and insurance to New York, and usually add 20 per cent to figure overhead and profit.

Q. State whether or not there was in existence in New York a market value for cherries in brine, similar to that prevailing for commodities such as potatoes or apples?

Mr. Donahue: I object to that, I don't know what——

The Commissioner: I will sustain the objection to the question in the form it is put.

Q. Is it not a fact that there is but one type of cherries in brine?

Mr. Donahue: Objected to as calling for a conclusion.

Q. State how many types of cherries in brine there are as to quality.

Mr. Donahue: I object to that on the ground that this witness has not been shown to be familiar with all qualities and types of cherries in brine.

Objection overruled.

A. There are whole cherries in brine, and broken, namely [fol. 20] known as "Scarto"—we are talking as of 1920 now.

Q. What are known as prime cherries in brine?

A. The whole cherries in brine.

Q. Do I understand you to say that there is but one quality of cherries in brine?

A. That is right.

Q. And when they are broken, then they are a second quality of "Scarto"?

A. They are called broken or "Scarto," or rejects—three names, broken or Scarto or rejects.

Q. In the course of your experience as an importer of cherries in brine, did you ever receive any shipments in a damaged condition?

Mr. Donahue: Objected to as immaterial.

The Commissioner: I will take it subject to connection.

A. I have.

Q. In what manner was the extent of damage ascertained?

Mr. Donahue: Objected to.

Objection sustained.

Q. What was the customary method among importers of cherries in brine, of ascertaining the extent of damage to cherries?

Mr. Donahue: Objected to.

Objection sustained.

Exception.

Q. What is your opinion as to the effect of a sale at public auction to demonstrate loss on a shipment of damaged cherries in brine?

[fol. 21] Mr. Donahue: Objected to on the ground that his opinion as to the effectiveness of a public sale is merely a conclusion.

Objection sustained.

Exception.

Q. What was the market in New York at that time for the sale of cherries in brine?

Mr. Donahue: Objected to unless the witness's knowledge is shown.

Objection overruled.

A. 10 cents a pound.

Q. Not the price, but was it a limited market or a broad market?

Mr. Donahue: Objected to as calling for a conclusion.

Q. Were there many buyers or few buyers of cherries in brine?

A. There were very few buyers.

Q. Do you know Rudolph C. Johnson, the cargo surveyor?

A. I do.

Q. What is his reputation among the importers of cherries in brine in New York, as to his qualifications as a cargo surveyor?

Mr. Donahue: Objected to.

Q. Has Mr. Johnson ever made surveys for damage to cherries in brine, imported by the firm with which you were connected?

A. He has.

Q. How frequently did this occur in the course of your eighteen years' experience?

Mr. Donahue: Another objection I have is: we are inter-
[fol. 22] ested in Johnson's qualifications as of 1920, not as of eighteen years. I want to know whether Johnson made any surveys for his company prior to or in 1920.

The Commissioner: You can cross-examine as to that.

(Question repeated.)

A. I have made three surveys with Mr. Johnson personally, in 1919, 1920 and——

Q. What method did Mr. Johnson adopt in ascertaining the extent of damage to those cherries?

Mr. Donahue: Objected to.

Objection sustained.

Q. Have you ever attended, with Mr. Johnson, on any other surveys of other firms on damaged merchandise?

A. I have been on the dock when he has been making surveys.

Mr. Donahue: I move to strike that out as not responsive, and furth r it is immaterial whether he was on the dock when Mr. ohnson was making surveys, that is of no help to us.

The Commissi ner: I will let it stand for what it is worth.

Q. What opin on did you form of Mr. Johnson's qualifications as a ca go surveyor of cherries in brine, as a result of your cor tact with him on these occasions you refer to?

Mr. Donahue: I object to that, what the witness's opinion of Mr. Johnson's qualifications may be can't help us.

[fol. 23] Objection overruled.

(Question repeated.)

A. He was a very able man to decide damage on this sort of commodity.

Mr. Donahue: I renew my objection and move to strike out the answer.

Objection overruled and motion denied.

Exception.

Q. The selling price which you have testified to, of 10 cents for cherries in brine in New York, would that also in your opinion be the selling price of the same commodity in Philadelphia in August and September, 1920?

Mr. Donahue: Obj ted to unless the witness's knowledge of conditions in the market in Philadelphia is shown.

Mr. Prem: He has stated he sells them all over the country.

The Commissioner: Is there any difference in the market value of that type of cherries in Philadelphia and New York?

The Witness: No, sir.

Q. Will you again please state to what cities you sold cherries in brine in the year 1920 and about the months of August and September. 1920?

A. New York City, Rochester, Boston, Baltimore, Philadelphia, Cincinnati, Covington, Kentucky; Peoria, Illinois; Chicago, Illinois and Portland, Oregon.

Q. What margin of profit did you, as an importer, figure on when you sold cherries in brine at 10 cents a pound, as you have testified?

[fol. 24] The Commissioner: He has already testified he had a 20 per cent. to cover overhead and profit.

Cross-examination.

By Mr. Donahue:

Q. What was your position in 1920?

A. My position with Ricardo Gomez & Dietlin Company?

Q. Yes.

A. Secretary and Treasurer or Vice-President and Treasurer, I think it was Secretary and Treasurer. I was an officer of the company anyhow.

Q. How long had you been connected with the company as of 1920—how long prior to 1920?

A. Since 1915.

Q. In what capacity did you begin with the company?

A. As Secretary.

Q. What business had you been in prior to 1915?

A. I had been with the American Trading Company, one of our main competitors.

Q. What business did they do?

A. They were in the cherries in brine business, as well as many other commodities.

Q. They were general importers?

A. Yes.

Q. They were not restricted to cherries in brine?

A. No.

Q. Neither was Ricardo Gomez & Dietlin Company?

A. No.

Q. Did you do any of the actual selling?

A. I did.

Q. In 1920, how many barrels of cherries did you handle, personally?

A. You mean in selling or importing—I handled the entire department on cherries in brine.

Q. How many barrels of cherries in brine did you actually sell in 1920?

A. I have already testified that we—well, that is—I guess I sold them all—I think I handled them all myself.

[fol. 25] Q. That is to say about from 10,000 to 15,000 barrels?

A. No, I testified 10,000 we handled, and the American Trading Company handled 15,000.

Q. You then personally sold 10,000 barrels in 1920?

A. Well, I don't know if I sold every barrel, but I handled the selling—the importing and selling of 10,000 barrels of cherries. I didn't go out and peddle them separately.

Q. Do my questions irritate you?

A. Yes, under those conditions.

Q. If you don't care to answer the questions—

A. I don't say I don't care to answer them. I said I handled the entire department. I imported them and sold them.

Q. Then your testimony is, you sold 10,000 barrels in 1920?

A. That is right.

Q. Now, to what concerns did you sell them—do you remember?

A. I remember some. You want the names of them?

Q. If you can.

A. I sold some to Vandyk & Reeves, Brooklyn; Keystone Fruit Products, Cincinnati; Liberty Fruit & Cherry, Covington, Kentucky; Star Fruit Company, Portland, Oregon; Stickney & Poor, Boston; International Fruit Products, Cincinnati—delivered out of Philadelphia; Hungarford, Smith, Rochester, New York. That is all I can remember now.

Q. And the 10,000 barrels were divided among all those various parties?

A. That is right.

Q. Do you remember what cherries you sold in the month of August, 1920—how many of the 10,000 barrels you sold in August, 1920?

A. No, I can't state the exact quantity, but I would say the bulk of them, because that is the time contracts are made.

[fol. 26] Q. What are these concerns to whom you sold the cherries—are they general dealers—wholesalers?

A. They are manufacturers of Maraschino cherries.

Q. All of them?

A. All of them, similar to Rheinstrom Brothers.

Q. Did you have anything to do with the cherries in question here—these Rheinstrom cherries involved in this suit?

A. I saw them on the dock.

Q. You saw the cherries on the dock?

A. Yes.

Q. You had no direct connection with Rheinstrom or with the cherries?

A. No, sir.

Q. What dock was it—New York or Philadelphia?

A. I referred to the New York shipment, because we had a shipment on the same steamer, that I recollect.

Q. You had a shipment on this very steamer?

A. If I am not mistaken.

Q. How many barrels?

A. I can't remember the quantity.

Q. Can you approximate it?

Mr. Prem: If you have to refresh your recollection, you may refer to your papers.

A. I think it was around 250 barrels—on the "Ansaldo".

Q. Where had those cherries been purchased, if you remember?

A. In Italy.

Q. Do you remember from what concern?

A. No.

Q. What type of cherries were they?

A. They were whole cherries in brine.

Q. And what quality?

A. Prime—at that time there were only two kinds—good or bad—broken, you might call them, as I testified before.

Q. Were these cherries one or the other?

[fol. 27] A. These were good cherries. The ones I am almost positive we had on the same ship.

The Commissioner: You refer to his own cherries?

Mr. Donahue: His own cherries.

Q. Your cherries were then turned out good?

A. We had prime cherries, yes.

Q. And those were not damaged?

A. I think we had a claim against the company which was paid.

Q. For how much?

A. A few barrels—I don't remember exactly.

Q. About how much do you suppose the claim amounted to?

A. It was a small claim—I had quite a mix-up at that time with the Steamship Company, I don't just recollect the story—I haven't access to the records, but I know we had quite a mix-up with McDonald & Truda at the time—the Steamship Company's agents.

Mr. Donahue: I move to strike out the statement about McDonald & Truda as agents, as a conclusion.

Motion denied.

Exception.

Q. If bad cherries are brought into contact with good, will the bad contaminate the good?

A. In the same barrel?

Mr. Prem: I object to the question, because there was nothing said about that on direct examination. If you want to make the witness your own for that purpose——

Q. When the bad and the good are in the same lot.

[fol. 28] Mr. Prem: I object to that, because I asked no questions on that on direct examination. If he wants to make the witness his own——

Mr. Donahue: This is an expert witness. I want to know how much of an expert he is. I am just testing him on that.

Objection overruled.

Exception.

A. You will have to define your question more clearly as to the same lot. They can't contaminate through the barrels. If you mean bad cherries in a barrel and there are damaged—I don't know what you mean by the question—same lot—I can't answer.

Q. I said in my question, contact.

The Commissioner: In the same container?

Mr. Donahue: I said in contact, so that would cover it.

A. In the individual container, yes.

Q. And if bad cherries come in contact with good cherries, the bad will contaminate the good?

A. That is the answer to the question, isn't it, that I have just made, yes.

Q. Were you ever employed by Rheinstrom Brothers?
A. No.
Q. Have you ever done business with them?
A. I have.
Q. Will you state what the business was?
A. I have made a number of sales to them at different times throughout my experience.
Q. Are they customers of yours now?
A. No.
Q. Were they at any time—or of you or of any concern [fol. 29] by whom you were employed?
A. Each time I made them a sale I would consider them a customer, yes.
Q. Are you on friendly terms with the organization?
A. Rheinstrom Brothers?
Q. Yes.
A. No.
Q. Do you know anybody in the organization?
A. I know Mr. James Rheinstrom.
Q. Did you discuss this case with Mr. Prem?
A. Before coming here?

Mr. Prem: Certainly he did.

A. (Continuing:) Certainly, he invited me, asked me to come over here, I haven't been subpoenaed, this was a friendly argument, I understood.

Q. You say you were on three surveys with Mr. Johnson in 1919 and 1920?
A. To the best of my recollection, yes. I know Mr. Johnson, I know others of the surveyors.
Q. How many of the surveys of the three were in 1920?
A. I can't say that distinctly. I remember meeting Mr. Johnson on the dock going over merchandise, appraising it, or watching him adjust the damage at three distinct times.
Q. Were you interested in those surveys?
A. Absolutely—on our own merchandise.
Q. Are you a surveyor?
A. Oh, no.
Q. You don't pretend to be a surveyor?
A. No. If I was asked, I might estimate damage for somebody else on cherries—I don't know much about it.

Re-direct examination.

By Mr. Prem:

Q. Mr. Donahue asked you if you were on friendly terms with Rheinstrom Brothers. Is it a secret why you aren't on friendly terms with them—would you care to answer or [fol. 30] wouldn't you care to answer it?

A. Yes, certainly—no, it is not a secret. He is what we call an "in and outer".

Q. What is the meaning of that term?

A. Usually buys direct to avoid paying profits and commissions.

Q. And was a large part of your income at that time derived from sales on cherries?

A. Oh, yes.

Q. And as a result of Mr. Rheinstrom's method of dealing, he avoided paying you those commissions or others engaged in a similar business?

A. Yes, that is right.

Q. During the times that you were engaged with Mr. Johnson in attending surveys of damaged cherries in brine, how did Mr. Johnson examine the damaged cherries?

Mr. Donahue: I object to that as immaterial, whatever way Mr. Johnson examined on that occasion isn't important here.

The Commissioner: I don't see it, but I will take it for my own information for what it is worth.

Mr. Donahue: Then you reserve my right to move to strike it out after?

The Commissioner: Yes.

(Question repeated.)

The Commissioner: State the method employed by Mr. Johnson in ascertaining the nature and extent of damage.

The Witness: The usual manner established in the trade, by a tryer through the bung hole, bringing out a couple of pounds of cherries. They line all the barrels up, that are damaged, and they have a long wire which is called a tryer. It is a long wire with a lot of prongs or hooks on the end, [fol. 31] go down into the barrel and catch onto the stems of the cherries, this side and that side, lay them out and estimate the amount of dryness, we might say, or damage to the cherries.

Q. How many cherries would that bring out by such method from each barrel?

A. Anywheres from half a pound to a couple of pounds. If a barrel is very much damaged, you have to go way down to the bottom, they are all dry sometimes—a total loss.

The Commissioner: And that is the method used in——

The Witness: Generally.

The Commissioner: To ascertain the nature and extent of the damage to the individual barrels?

The Witness: Yes, that is right.

Mr. Donahue: My objection was to the witness stating that this is the usual and customary method employed by surveyors.

Objection overruled.

Exception.

Q. Have you ever observed other cargo surveyors in examining damaged cherries in brine, other than Mr. Johnson?

A. Oh, yes.

Q. What method did they follow?

A. The same method. There is only one way to get at them.

[fol. 32] WALTER J. SHIELS, being duly sworn and examined as a witness for the libellant, testified as follows:

By Mr. Prem:

Q. What business are you in Mr. Shiels?

A. Importing business.

Q. Of what commodities?

A. Principally cherries in brine.

Q. How long have you been engaged in that business?

A. About fifteen years—fourteen or fifteen years.

Q. In New York City?

A. That is right.

Q. Were you engaged in that business in August and September, 1920?

A. I was.

Q. How many importers were there, of cherries in brine at that time?

A. At that time?

Q. Yes, to your knowledge.

A. Three or four, perhaps.

Q. What kind of a market was there in New York City for cherries in brine at that time?

A. What kind of a market?

Q. Yes, with respect to the number of purchasers—many or few?

A. I don't quite understand your question.

Q. Were there many prospective purchasers of cherries in brine in August and September, 1920, or were there few?

Mr. Donahue: If that is confined to the witness's knowledge, I don't object, but in the present form I do object.

Q. Was there a limited market or a broad market in New York for the sale of cherries in brine at that time?

A. Well, the market was limited to a certain number of buyers of cherries every year—probably 10,000 or 15,000 [fol. 33] barrels were bought at that time, I don't just remember that.

Q. That 10,000 or 15,000 relates to your experience?

A. Yes.

Q. Have you any recollection of sales prices prevailing in New York City for cherries in brine in 1920, August and September?

A. So newhere in the neighborhood of 10 cents a pound.

Q. I show you three invoices, and ask you to state if you are familiar with that commodity (handing witness translations of Libellants' Exhibit 7, consisting of three invoices).

A. Yes, these are invoices covering the purchase of cherries in brine.

Q. The commodity which you say sold for 10 cents a pound in New York City—is that the same or different from the commodity referred to in those invoices?

A. I would say it is the same—cherries in brine.

Q. What company were you with in 1920, August and September?

A. I was with Ricardo Gomez & Dietlin Company.

Q. The same company Mr. DeRedon was with?

A. That is right.

Q. Do you know Mr. Johnson, a cargo surveyor employed by Kohler, Kemp & Kohler?

A. Yes, I know Mr. Johnson.

Q. Did you ever accompany Mr. Johnson on any of his surveys of cherries in brine?

A. A number of times.

Q. Will you describe the method he employed in ascertaining the extent of damage to cherries in brine?

Mr. Donahue: Objected to.

Objection overruled.

Exception.

[fol. 34] A. Why, when a shipment of cherries arrived, we would make an inspection on the dock—somebody from our office. If we found any damaged barrels, we would immediately notify the Insurance Company, who would in turn appoint a surveyor. Very often it was Kohler, Kemp & Kohler. They in turn would designate one of their men, and as a rule the formality was they would ask us to set aside any damaged barrels—by damaged barrels meaning barrels that the brine had leaked out of or cherries come out of—been totally lost out of the barrel—and we would make an appointment with the surveyor and go to the dock, remove the bungs in the barrels, and the surveyor would proceed to determine what percentage of damage was done to that particular barrel.

Mr. Donahue: Each one—each particular barrel?

Q. How would he go about it, what would be the method he would use to make his examination?

A. In order to see the cherries, he would insert the instrument—he used to have a wire with a lot of hooks on it—put that down into the barrel and catch hold of a lot of the cherries, bring them up, bring up a couple of handfuls, determine the amount of shrinkage, amount of damage to the cherries, and he would base his finding on that.

Q. How many times do you estimate you accompanied Mr. Johnson on such missions?

A. Well, to state a different number of times I have accompanied Mr. Johnson would be difficult. I have probably accompanied Mr. Johnson ten or twelve times.

[fol. 35] Q. Have you ever accompanied any other surveyors on similar occasions?

A. Oh, yes, yes.

Q. Did their method of ascertaining the damage differ from that method employed by Mr. Johnson?

Mr. Donahue: Objected to as immaterial.
Objection overruled.
Exception.

A. Why, no different particular method.

Q. Did they insert a wire or wire prong in the barrel and withdraw the cherries?

A. As a rule. Of course, if the barrel were all smashed up and no cherries left, there would be no doubt as to the loss.

Q. There would be no purpose of inserting a tryer then?

A. No.

Cross-examination.

By Mr. Donahue:

Q. Did you see the cherries that were involved in this suit—the barrels or the cherries?

A. Not to my recollection.

Q. You didn't go with Mr. Johnson on this survey?

A. No, I wouldn't have anything to do with this particular shipment as to the examining of them, no.

Q. Did you have any cherries off that same ship?

A. Well, that is rather difficult to answer. We have had cherries coming in steamer after steamer, I couldn't remember that far back, possibly we did.

Q. You are not a surveyor, are you, Mr. Shiels?

A. No, sir.

Q. What was your position in August and September, 1920?

A. I was with the firm of Ricardo Gomez & Dietlin Com- [fol. 36] pany, and my duties were to follow up the incoming shipments, as to the clearance, the deliveries on the dock, the inspection by the buyers, and in case of a damage, adjustment with the surveyor, follow those movements right on. In other words, I followed the movement of the shipment from the time it was advised aboard until it reached its destination.

Q. Were you the only one in the office who had those duties?

A. Why, I did most of the work, most of the outside work.

Q. So that if there had been a shipment of cherries consigned to you on the same steamer that brought the cherries

here in question, you undoubtedly would have been the man to go over to the pier to inspect them and receive them?

A. Very likely.

Q. How long had you been with the company in August and September, 1920?

A. I had been with the company since its inception, and I don't recall the year the company was formed.

Q. You say you have been in the business fourteen or fifteen years?

A. Handling of cherries—about fourteen years. I have been in this business about twenty years.

Q. What, in August and September 1920, were your duties?

A. As I described before.

Q. You didn't have anything to do with the selling of cherries?

A. Very little—in some instances, yes, but very little.

Q. How many barrels of cherries did you sell in August, 1920?

A. The month of August?

Q. Yes.

A. I couldn't answer that, I don't know.

Q. How many in the month of September, 1920?

A. I couldn't answer that. We usually calculated our [fol. 37] sales by the season, and the season would run from May until perhaps September—the selling season. We would have cherries coming in all the time.

Q. You don't remember having participated in any actual sales in August and September, 1920?

A. Oh, I was present a number of times when conversations were on.

Q. I want to know now whether you personally sold any cherries in brine in barrels in August and September, 1920, and if you did sell any, how many barrels you sold and to whom you sold them.

A. I don't remember that.

Q. How many kinds of cherries are there shipped in brine?

A. Well, at that time there were prime cherries, whole prime cherries, and another variety, inferior variety, known as Scarto.

Mr. Prem: That makes two, does it?

The Witness: Yes, that makes two, that is right.

Q. If bad cherries come in contact with good cherries, they will contaminate the good, will they not?

Mr. Prem: I object to that question on the ground that this witness has not been qualified as a surveyor of cherries.

The Commissioner: I think you should include whether they are in brine or not.

Mr. Donahue: I am not interested in them in brine. I am interested in them before they are put in brine. That is the very point of my question.

Mr. Prem: If you want to make him your witness, go ahead.

[fol. 38] Objection overruled.

Exception.

Q. There is no doubt about it, Mr. Shiels, that if bad cherrier——

A. I can't conceive of the bad cherries coming in contact with the good ones.

Q. I assume that the bad cherries came in contact with the good ones, there is no doubt that they are going to contaminate the good?

A. If they are in brine, I should have my doubt about it, yes.

Q. I am not asking about brine.

A. We are speaking of cherries in brine.

Q. I didn't state anything about in brine. Isn't it a fact, Mr. Shiels—is there any doubt about it—that if bad cherries come in contact with good cherries, that in the passage of time they will contaminate the good cherries?

Mr. Prem: Objected to, it isn't specified where the cherries get in contact, whether they are in brine or not in brine, whether in containers or not in containers, and I ask that the question be made clear and explicit on that point. It is too general and vague entirely.

Objection overruled. I think it is self evident that any bad fruit coming in contact with good fruit, it will contaminate the good fruit.

Question repeated.

Mr. Prem: I object to the question on the further ground that the description "bad cherries" is not made more explicit, whether he means broken cherries, Scarto cherries or decayed cherries.

[fol. 39] All right, deteriorated cherries.

Mr. Prem: I still object to the question.

The Commissioner: The word "bad" indicates to me "decayed".

Q. I am using the word deterioration.

A. I am afraid I can't answer that question in that form.

The Commissioner: What is a Scarto cherry?

The Witness: A Scarto cherry is a stained cherry as a rule—stained—it has been stained by the weather, stained or cracked. Perfectly healthy cherry put in brine, used for——

Mr. Prem: Is it a decayed cherry?

The Witness: No, it is not.

Q. What is a spotted cherry?

A. A spotted cherry is a cherry that won't bleach out in the bleaching of the fruit, in the bleaching process.

Mr. Prem: Is that a decayed cherry?

The Witness: No, sir, stained or spotted cherry, we know them as.

Q. Is that less value than a prime cherry?

A. Yes.

Re-direct examination.

By Mr. Prem:

Q. Is that known as a second quality—a spotted cherry?

A. A spotted cherry—at that time the quality of spotted cherries didn't exist—there were two qualities—the whole prime cherries and the Scarto cherries.

[fol. 40] Q. The Scarto cherry was a class by itself?

A. The Scarto cherry was a class by itself.

Re-cross-examination.

By Mr. Donahue:

Q. What would you call a cherry that is in the process of decay—however slight that might be, however little the decay may have progressed?

A. It would be a decayed cherry—decayed fruit.

Q. And you haven't any doubt, have you, that if such decayed fruit is brought into contact with sound cherries, that the decayed fruit will contaminate the good?

A. In the fresh state, yes, but not in the brine.

Q. I didn't ask you about brine. I said if they do come in contact now—not in brine—there is no doubt about it?

A. I will say yes, in the fresh state there is no doubt about that, we all know that.

[fol. 41] LIBELLANT'S EXHIBIT 1

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

THE RHEINSTROM BROTHERS COMPANY, Libellant,

against

S. S. "ANSALDO SAN GIORGIO I," SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant

Interrogatories Addressed to August Kiefer, a Witness on Behalf of the Libellant, and Answers Thereto

First Interrogatory: What is your name, age and present occupation?

Answer: My name is August Kiefer. I am fifty-six years old and I am occupied by acting as Agent for the Rheinstrom Brothers Company.

Second Interrogatory: What was your occupation in May, June and July, 1920, and for how long had you been so employed?

Answer: I was acting as Agent for the Rheinstrom Brothers Company and have been doing so since 1903.

Third Interrogatory: If you state that you were employed by The Rheinstrom Brothers Company, state in detail the nature of such employment.

[fol. 42] Answer: If the Rheinstrom Brothers Company needs any European product I will be informed of it. Then I demand prices from the manufacturers or packers and give such prices to the Rheinstrom Brothers Company. I make the contracts with the packers in the name of the Rheinstrom Brothers Company. Then I am present at the

packing places to supervise the preparing, packing and weighing of the products. Furthermore, I have to take care of the payments and these are made against documents only after being approved by myself. I am occupied mostly by the cherry business and principally I have to be on the watch for the shipping of good quality fruits, for the condition of the containers and for the right weights.

Fourth Interrogatory: Did you have any connection with a lot of 2,955 barrels of cherries in brine purchased by The Rheinstrom Brothers Company from Societa Esportazione Agricola Ligure, and shipped at Naples on the steamship "Ansaldo San Giorgio I," in July, 1920, consigned to the First National Bank of Cincinnati at Philadelphia?

Answer: I am fully informed concerning the lot of 2,955 barrels of cherries in brine purchased by the Rheinstrom Brothers Company from the Societa Esportazione Agricola Ligure, as I made the purchase, inspection, shipment of, and payment for these cherries. These cherries were not loaded in Naples, but in Genoa.

Fifth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in full your connection and duties with reference to said shipment.

[fol. 43] Answer: After having made the purchase contract I had to supervise the preparing of the cherries so that the packers were given only good and sound quality fruits, well sorted and well sulphured; the packing, so that the barrels were well cleaned, in good order, and after being filled that they were well closed; the weighing, so that the right weight was given; the shipping, so that no barrel was loaded without having been inspected; that no barrel leaked, and that they were loaded with the bung on the upper side.

Sixth Interrogatory: State, if you know:

(a) Where said cherries were prepared for shipment.

Answer: Said cherries were prepared for shipment in Savona at the factory of the Societa Esportazione Agricola Ligure, and in the property of the former Societa Chinotti Company, which is at a place near the sea; in Modena at the factory of Carlo Venturelli. A few of the barrels were packed at various places, such as Voghera, Verona, etc. These barrels were all opened, thoroughly inspected and the weight controlled at this place near the sea in Savona.

(b) When said cherries were prepared for shipment.

Answer: The said cherries were prepared during the period from about the end of May up to the middle of July, 1920.

Seventh Interrogatory: Were you present when said cherries were prepared for shipment?

Answer: Yes.

Eighth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state the process [fol. 44] or processes through which the cherries were put in preparing them for shipment, enumerating, in order, the various steps taken until they were placed in containers for delivery to the railroad.

Answer: The cherries from the market or the country were first sorted and the spotted fruit was eliminated. Then the cherries were sulphured, by which process they are preserved for years. After being sulphured (in a closed room) the cherries were taken out, sorted again and put in the barrels on the scale. The weighing was supervised by myself or my assistant, Mr. Gasperini. Then the barrels were placed in the depot where they were filled with water. Before being shipped they were again inspected by me and marked with a blue sign A K which has always been a guarantee to the Rheinstrom Brothers Company that they were receiving the right quality of cherries, the right weight, and that the barrels were in good condition. This depot has been in the packing place, either in their room, yard, or garden. Special attention was given to see that the barrels were well closed and loaded on the cars and that wherever loaded they were placed with the bung on the top.

Ninth Interrogatory: Did you supervise their preparation for shipment?

Answer: Yes. I supervised the preparation of the cherries.

Tenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your supervision.

Answer: I supervised the preparation of these cherries [fol. 45] from the beginning up to the shipment as said in my first answer.

Eleventh Interrogatory: Did you inspect said cherries?
Answer: Yes.

Twelfth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your inspection.

Answer: Before leaving each barrel was inspected to see if the cherries were in good state and also if the barrels showed no leakage. If contents and barrel were at my full satisfaction I personally marked A. K. This mark has always been a control wherever I saw the barrels, in the depot, in the cars, in the port and on the steamer, that the Rheinstrom Brothers Company received inspected goods.

Thirteenth Interrogatory: Did anyone assist you in your work of supervision and inspection?
Answer: Yes.

Fourteenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state:

(a) The name of said party.
Answer: My assistant has been Mr. Umberto Gasperini.

(b) The part taken by said party in said supervision and inspection.

Answer: Mr. Gasperini assisted in the supervision of all things by doing the same work as myself. Sometimes, if I had to make a short trip from one place to another, Mr. Gasperini had the supervision alone. However, I have [fol. 46] always personally made the last inspection to see that, before shipment, the cherries had not fermented, that the proper solution was used and then I marked the barrels with my name to make sure that they had been finally inspected.

Fifteenth Interrogatory: State if you know whether said cherries were weighed.

Answer: Said cherries were weighed at the places where they were packed.

Sixteenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state whether said cherries were weighed before being placed in containers for shipment, or whether the containers were first

weighed and then the containers and their contents weighed together and the tare subtracted.

Answer: Generally the containers were first weighed, remaining on the scale they were filled and the containers and their contents were weighed together. Then all barrels were filled with cherries up to a net content which has always been the same at the same packing places.

Seventeenth Interrogatory: Did you check the weight of said cherries and/or cherries and containers as they were weighed?

Answer: Yes. The weighing has been controlled personally either by myself or my assistant.

Eighteenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state how many kilos said cherries weighed, giving details.

Answer: The barrels have been filled at least with the relative net weight as stated in the bill, 792 barrels each [fol. 47] of 130 kilos and 2,163 barrels each of 132 kilos.

Nineteenth Interrogatory:

(a) State, if you know whether the amount of cherries described in your answer to the last preceding interrogatory was placed in containers and made ready for shipment on cars.

Answer: I know that the amount of cherries as described in my eighteenth answer were placed in containers and made ready for shipment on cars.

(b) If your answer to "(a)" is in the affirmative, describe the condition of said containers.

Answer: The condition of said containers was good. Other containers would have been refused. Wherever a barrel showed leakage it has been repaired or it has been changed.

(c) Were said containers making up said shipment of 2,955 barrels of different capacities?

Answer: Said containers making up said shipment of 2,955 barrels have been of about the same capacity.

Twentieth Interrogatory: If your answer to the Nineteenth Interrogatory (c) is in the affirmative, state the number of barrels of each capacity and give the total weight of the cherries contained in the barrels of each capacity together with the quality of said cherries.

Answer: The capacity of the 792 barrels packed with 130 kilos net is the same as the others. The difference of the 2 kilos comes from the fact that the Modena cherries are larger and harder, taking more space. The quality was good and sound.

[fol. 48] Twenty-first Interrogatory: Did you have any connection with a lot of 466 casks and/or barrels of cherries in brine purchased by The Rheinstrom Brothers Company from Ghisetti Antonio & Cia., and shipped at Genoa on the steamship "Ansaldo San Giorgio I", in July, 1920, consigned to order at Philadelphia?

Answer: I purchased this lot of cherries for the Rheinstrom Brothers Company from Ghisetti Antonio & Cia. and had to supervise the preparing, weighing, and shipping of these cherries and to make the payment therefor.

Twenty-second Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in full your connection and duties with reference to said shipment.

Answer: With these cherries I had to do the same duties as described in my fifth answer.

Twenty-third Interrogatory: State if you know:

(a) Where said cherries were prepared for shipment.

Answer: Said cherries were prepared for shipment at the factory of Ghisetti Antonio & Cia. in Modena.

(b) When said cherries were prepared for shipment.

Answer: They were prepared about the beginning of June, 1920.

Twenty-fourth Interrogatory: Were you present when said cherries were prepared for shipment.

Answer: Yes.

Twenty-fifth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state the pro-
[fol. 49] cess or process through which the cherries were put in preparing them for shipment, enumerating, in order, the various steps taken until they were placed in containers for delivery to the railroad.

Answer: Same as stated in my eighth answer.

Twenty-sixth Interrogatory: Did you supervise their preparation for shipment?

Answer: Yes.

Twenty-seventh Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your supervision.

Answer: I supervised the preparation of said cherries from the beginning up to the shipping as outlined in my fifth answer.

Twenty-eighth Interrogatory: Did you inspect said cherries?

Answer: Yes, I inspected these cherries personally.

Twenty-ninth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your inspection.

Answer: Same as stated in my twelfth answer.

Thirtieth Interrogatory: Did anyone assist you in your work of supervision and inspection?

Answer: Not in Modena.

Thirty-first Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state: (a) the name of said party; (b) the part taken by said party in [fol. 50] said supervision and inspection.

Answer: Answered under the thirtieth interrogatory.

Thirty-second Interrogatory: State if you know whether said cherries were weighed.

Answer: The cherries were weighed at the factory of Ghisetti Antonio & Cia., Modena.

Thirty-third Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state whether said cherries were weighed before being placed in containers for shipment, or whether the containers were first weighed and then the containers and their contents weighed together and the tare subtracted.

Answer: These cherries were weighed before being placed in containers for shipment.

Thirty-fourth Interrogatory: Did you check the weight of said cherries and/or cherries and containers as they were weighed?

Answer: Yes, I controlled the weight of said cherries.

Thirty-fifth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state how many kilos said cherries weighed, giving details.

Answer: The whole weight of the lot was 56,935 kilos but, as there was some spotted fruit because they were not thoroughly sorted by the girls, I agreed with the seller to accept the lot with a net weight of 55,895 kilos, as also billed.

Thirty-sixth Interrogatory: State, if you know, whether the amount of cherries described in your answer to the last [fol. 51] preceding interrogatory was placed in containers and made ready for shipment on cars.

Answer: I know that said weight of 55,895 kilos was placed in containers and made ready for shipment on cars.

(b) If your answer to (a) is in the affirmative, describe the condition of said containers.

Answer: The containers were new barrels in very good condition.

(c) Were said containers making up said shipment of 466 casks and/or barrels of different capacities?

Answer: The barrels were of a different capacity.

Thirty-seventh Interrogatory: If your answer to the Thirty-sixth Interrogatory (c) is in the affirmative, state the number of barrels of each capacity and give the total weight of the cherries contained in the barrels of each capacity together with the quality of said cherries.

Answer: These cherries were packed as follows:

21 barrels with 230 kilos net fruits each—4,830 kilos
222 barrels with 182 kilos net fruits each—40,404 kilos
15 barrels with 147 kilos net fruits each—2,205 kilos
121 barrels with 35 kilos net fruits each—4,235 kilos.

All these 379 barrels of 51,674 kilos contained sound fruit of good quality.

[fol. 52] 8 barrels with 182 kilos net fruits each—1,456 kilos
79 barrels with 35 kilos net fruits each—2,765 kilos.

These 87 barrels of 4,221 kilos contained second quality fruit (sound fruit but somewhat spotted).

Thirty-eighth Interrogatory: Did you have any connection with the lot of 845 barrels of cherries in brine purchased by The Rheinstrom Brothers Company from Societa Esportazione Agricola Ligure and shipped at Naples

on the steamship "Ansaldo San Giorgio I" in July 1920, consigned to order at New York?

Answer: I had full connection with this lot of 845 barrels of cherries purchased by the Rheinstrom Brothers Company from Societa Esportazione Agricola Ligure, I having made the purchase, inspection, shipment of, and payment for them.

Thirty-ninth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in full your connection and duties with reference to said shipment.

Answer: With these cherries I had to do the same as described in my fifth answer.

Fortieth Interrogatory: State, if you know:

(a) Where said cherries were prepared for shipment.

Answer: I know that a part were prepared in the property of Luigi Ceretto in Maddaloni Inferiore, another part in the property of Ant. (?) Napoletano in Baiano.

[fol. 53] (b) When said cherries were prepared for shipment.

Answer: Said cherries were prepared from about end of May until middle of July, 1920.

Forty-first Interrogatory: Were you present when said cherries were prepared for shipment?

Answer: I was present, as was also my assistant.

Forty-second Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state the process or processes through which the cherries were put in preparing them for shipment, enumerating, in order, the various steps taken until they were placed in containers for delivery to the railroad.

Answer: Same processes as stated in my eighth answer.

Forty-third Interrogatory: Did you supervise their preparation for shipment?

Answer: I supervised their preparation for shipment, with the aid of my assistant.

Forty-fourth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your supervision.

Answer: I supervised the preparation of these cherries from the beginning up to the shipment as stated in my fifth answer.

Forty-fifth Interrogatory: Did you inspect said cherries?
Answer: Yes.

[fol. 54] Forty-sixth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your inspection.
Answer: I did the same as described in my twelfth answer.

Forty-seventh Interrogatory: Did anyone assist you in your work of supervision and inspection?
Answer: Yes.

Forty-eighth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state:
(a) The name of said party.
Answer: Mr. Umberto Gasperini.

(b) The part taken by said party in said supervision and inspection.
Answer: Same as stated in my fourteenth answer.

Forty-ninth Interrogatory: State if you know whether said cherries were weighed.
Answer: Said cherries were weighed at their packing places in Maddaloni and Baiano.

Fiftieth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state whether said cherries were weighed before being placed in containers for shipment, or whether the containers were first weighed and then the containers and their contents weighed together and the tare subtracted.
Answer: Same as stated in my sixteenth answer.

Fifty-first Interrogatory: Did you check the weight of said cherries and/or cherries and containers as they were weighed?
[fol. 55] Answer: Yes. The weighing has been controlled personally either by myself or my assistant.

Fifty-second Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state how many kilos said cherries weighed, giving details.

Answer: Each of these 845 barrels were packed with 132 kilos of cherries.

Fifty-third Interrogatory:

(a) State, if you know, whether the amount of cherries described in your answer to the last preceding interrogatory was placed in containers and made ready for shipment on cars.

Answer: I know that the total weight of 111,540 kilos of cherries were placed in containers and made ready for shipment on cars.

(b) If your answer to (a) is in the affirmative, describe the condition of said containers.

Answer: The containers were in good condition.

(c) Were said containers making up said shipment of 845 barrels of different capacities?

Answer: The containers making up said shipment of 845 barrels were of about same capacity.

Fifty-fourth Interrogatory: If your answer to the Fifty-third Interrogatory (c) is in the affirmative, state the number of barrels of each capacity and give the total weight of the cherries contained in the barrels of each capacity together with the quality of said cherries.

Answer: All barrels had about the same capacity. The cherries in these 845 barrels were good quality and total [fol. 56] weight amounted to 111,540 kilos. Each barrel contained 132 kilos of cherries.

Cross-Interrogatories Addressed to August Kiefer, and Answers Thereto

First Cross-interrogatory: If in answer to the "Fourth" interrogatory you say you recall "2,955 barrels of cherries in brine * * * shipped at Naples on the steamship 'Ansaldo San Giorgio I, in July, 1920," state if you saw the said cargo at Naples prior to being loaded on the aforementioned steamer.

Answer: I do not remember, but I probably saw these barrels on the pier before being loaded. However, this shipment was made in Genoa and not in Naples as stated by you.

Second Cross-Interrogatory: State (a) if you saw the said steamer in the port of Naples.

Answer: I do not remember. (Referring to Genoa.)

(b) If you saw her being loaded with the barrels in question.

Answer: I do not remember. (Referring to Genoa.)

State (c) Whether the said vessel was then lying at a pier or at anchor.

Answer: I do not remember. (Referring to Genoa.)

(d) If the said vessel loaded the said barrels directly from a pier or from lighters.

Answer: I do not remember. (Referring to Genoa.)

[fol. 57] (e) In what position the said steamer was lying.

Answer: I do not remember. (Referring to Genoa.)

Third Cross-interrogatory:

(a) Did you act as Rheinstrom's agent or representative in negotiating with the shipper for the buying of the said 2955 barrels?

Answer: Yes.

(b) What did you have to do with the buying or purchasing of the said barrels?

Answer: I obtained the seller's quotations on these barrels, then I cabled the prices to the Rheinstrom Brothers Company for their confirmation and, after it was received, I concluded the contract covering this purchase.

Fourth Cross-interrogatory: Did you act as agent or representative for Rheinstrom Brothers in connection with the packing or inspection of the said 2955 barrels?

Answer: Yes, I supervised the packing and inspected the said 2,955 barrels as the Agent of the Rheinstrom Brothers Company.

(b) Who were you employed by in June, July and August, 1920?

Answer: I was employed by the Rheinstrom Brothers Company.

(c) Were you employed by the shipper of the said 2955 barrels or were you employed by Rheinstrom Brothers or were you employed by someone else, and, if so, state who?

Answer: I was employed by the Rheinstrom Brothers Company.

[fol. 58] Fifth Cross-interrogatory:

(a) Did you see any or a part of the 2955 barrels while they were still empty, that is, before the cherries in brine were put into them?

Answer: Yes, I saw most of the barrels when they were empty.

(b) If so, describe in full detail their condition.

Answer: The barrels were in good condition, otherwise they would have been rejected by me.

(c) Had they ever been used before as containers of any other liquids?

Answer: Part of the barrels had been previously used as containers for vegetable oil.

(d) Prior to having the cherries in brine placed in them had they been cleaned, and, if so, describe in the fullest detail how they had been cleaned?

Answer: Before the cherries in brine were placed in the containers the insides of these barrels were cleaned by heat, so that the vegetable oil was fully taken out of the wood, and then the barrels were paraffined. It was prescribed to the seller of the cherries that they be placed in barrels that had been previously used only once.

(e) If you state that they had been cleaned state what, if anything, was done to them before the cherries were put into them?

Answer: The barrels were paraffined.

(f) Describe in detail how they were prepared to receive the cherries.

Answer: As stated under (d) and (e), immediately above.

(g) State in full the reasons why they were prepared as you have described them.

[fol. 59] Answer: So that the cherries would not absorb the oil.

(h) Give the date when you first saw these barrels and describe their condition at that time.

Answer: I first saw these barrels between the 5th and 10th of June, 1920. Their condition was good.

(i) Give the date when the packing commenced and describe in detail the condition of the barrels at that time.

Answer: I first saw the barrels when the packing commenced, as stated under letter (h) of this question.

Sixth Cross-interrogatory:

(a) Give the date when the packing of the said 2,955 barrels was commenced.

Answer: The same date as mentioned in reply to question No. 5 (h).

(b) Give the date when the packing of the said 2955 barrels was finished.

Answer: The packing was finished between the beginning and the middle of July, 1920.

(c) Give the date when the heads of said barrels were finally put in or they were finally closed and ready for shipment.

Answer: After the final inspection by myself and after they had been marked A K by myself, between June and July, 1920.

(d) Describe in full detail how they were closed and made ready for delivery to the carrier.

Answer: We saw that the right sized bung was used and the same tightened with the use of burlap.

[fol. 60] Seventh Cross-interrogatory:

(a): In what locality, giving the name of the city, town or district, were the barrels in question packed?

Answer: A part of the barrels in question were packed in Modena and partly in Savona. The said barrels were packed at the factory of Carlo Venturelli in Modena, further at factory of the former Societa Chinotti and at factory of Societa Esportazione Agricola Ligure in Savona.

(b) Were the said barrels packed in a building, such as a factory, shed, or the like, and, if so, describe such place in full detail?

Answer: The cherries were packed partly in buildings and partly outside of buildings in the factory ground.

Eighth Cross-interrogatory:

(a) State when you first saw the cherries prior to their being packed in the barrels in question.

Answer: I first saw the cherries when they were placed in the barrels in question.

(b) Were they green, that is, fresh from the trees, or—

Answer: Most of the cherries I saw when green and the balance when they were sulphured.

(c) Were they dried or otherwise prepared for packing?

Answer: The cherries were sulphured and sorted.

(d) Was anything done to the said cherries prior to being packed and—

Answer: The cherries were sulphured and sorted.

(e) If so, describe in detail just what was done to them before they were placed in the barrels.

[fol. 61] Answer: As stated in reply to question 8 (c) and (d).

Ninth Cross-interrogatory: Were the said cherries subjected to (a) heat, or—

Answer: No.

(b) Chemicals of any kind, prior to being placed in the barrels?

Answer: Only treated with sulphur.

Tenth Cross-interrogatory:

(a) After the cherries were put in the barrels was any solution of any kind placed over them, and, if so—

Answer: After the cherries were put in the barrels, these barrels were filled with water and sulphured water.

(b) state of what it was composed, that is

(c) give the chemical analysis of such solution, and

(d) describe how this solution was put over the cherries.

Answer: The solution consisted of sulphured water and it is possible that in 1920 a quarter of a gallon or less of this sulphured water has been strengthened with bysulphite or sulphurous anhydride. Before closing the barrels, about three kilos of salt were placed in each to satisfy customs requirements, and to complete the brine.

Eleventh Cross-interrogatory:

(a) Was the same quantity of cherries put in each of the said 2,955 barrels and if not—

Answer: No.

(b) State what quantity was put in each barrel.

[fol. 62] Answer: 792 barrels each contained 130 kilos. 2,163 barrels each contained 132 kilos.

(c) What kind of measure, scales or other implement was used to measure or weight out the quantity of cherries that was placed in each barrel, and—

Answer: A scale was used.

(d) describe the same in detail.
Answer: Centesimal weight.

Twelfth Cross-interrogatory:

(a) How many pounds or kilograms of cherries were placed in each barrel?
Answer: As stated in No. 11 (b).

(b) How many pounds or kilograms of liquid was placed over the cherries after they were put in the barrel?
Answer: From 60 to 70 kilos of liquid.

(c) Were you present when the cherries were put into each of the said 2955 barrels?
Answer: Either I or my assistant, Mr. Gasperini, was present.

(d) Did you personally see the amount of cherries that was put into each barrel?
Answer: Either I or my assistant saw the amount of cherries put in each barrel.

(e) If not, in how many barrels did you actually see them placed.
Answer: Answered by statement in 12 (c) and (d).

Thirteenth Cross-interrogatory:

(a) After the cherries were put in the barrels were the [fol. 63] barrels completely filled with "brine" or some other solution?
Answer: Yes.

(b) If you say the said barrels were not completely filled with cherries and brine state to what percent. the barrels were filled.
Answer: Completely filled.

Fourteenth Cross-interrogatory: If you state that brine was used in packing the cherries in the barrels and have not already done so give (a) the ingredients of the said brine, (b) the chemical analysis of each ingredient and the percentage of each ingredient that went to make up the said brine.

Answer: Answer under cross-interrogatory No. 10 (b), (c) and (d).

Fifteenth Cross-interrogatory:

(a) Did you make a chemical test or any other kind of a test to ascertain what the said brine contained and the percentage of its ingredients?

Answer: No.

(b) If not, from what source did you obtain the information given above?

Answer: By personally testing and smelling the brine.

Sixteenth Cross-interrogatory:

(a) Why was brine placed on the cherries?

Answer: To preserve the cherries and to satisfy the customs authorities.

(b) If brine had not been placed on the cherries in about how many days would they have commenced to decay?

Answer: I do not know.

[fol. 64] (c) If brine had not been placed on the cherries of the chemical analysis described by you above, would they have decayed after a certain period?

Answer: Yes.

(d) Would the period within which the cherries might decay depend upon whether there was or was not any brine placed on them?

Answer: Yes.

(e) Would the period within which the cherries might decay depend upon the strength or weakness of the brine placed upon them?

Answer: Yes.

(f) If you have stated that the brine consists of a saline solution of one character or another, state what would be the minimum percentage of salt or salts that it should contain in order to prevent the decaying of cherries that might remain in barrels for at least two months.

Answer: I do not know exactly the minimum percentage of salt that would be used, but I believe it was about 3 per cent., and from my long experience, by testing and smelling, I know what is strong enough. Further, I know that if the cherries are thoroughly sulphured they are preserved in ordinary water.

Seventeenth Cross-interrogatory:

(a) How were the said 2,955 barrels marked?

Answer: R. B. Cincinnati.

(b) Describe in detail just exactly how they were marked.

Answer: They were stencilled in paint "R. B. Cincinnati".

[fol. 65] (c) Attach hereto on a separate sheet of paper a reproduction of the said marks, and—

Answer: The exact reproduction of the said mark is not possible now. However, I remember that the letters R. B. were from 10 to 12 centimeters high, and that the letters of the word "Cincinnati" were from 6 to 8 centimeters high.

(d) State in full detail how it happens that you can remember at this late date the information that you have just given.

Answer: From my memory and business records.

Eighteenth Cross-interrogatory: Describe in detail the method of heading, fastening or closing the said barrels after the cherries in brine were placed in them to prevent leakage of contents.

Answer: The barrels were closed by placing on the lid and tightening and sealing it by a vegetable product known in German as "Schilf".

Nineteenth Cross-interrogatory:

(a) Did all of the said 2,955 barrels leave the place where they were packed, or the places where they were packed, at the same time?

Answer: Yes.

(b) Give the dates when and the number of barrels that left the place of packing on each date.

Answer: Exact date not known. But 792 barrels were shipped from Modena about the middle of July, 1920, and 2,193 barrels were shipped from Savona about the same date.

(c) Describe in detail what kind of conveyance was used [fol. 66] in conveying them from their place of packing.

Answer: Railroad.

Twentieth Cross-interrogatory: How many English miles is it from the place or places where the said 2,955 barrels

were packed to the place where they were loaded on board the steamship "Ansaldo San Giorgio I"?

Answer: It is about 175 English miles from Modena to Genoa and about 25 English miles from Savona to Genoa, where the barrels were loaded aboard the S/S "Ansaldo San Giorgio I."

Twenty-first Cross-interrogatory: If you have not already done so, describe in detail the kind of conveyances that were used in transporting the said 2,955 barrels from the place or places where they were packed to the port where they were loaded on board the "Ansaldo."

Answer: Railroad transportation used.

Twenty-second Cross-interrogatory:

(a) Had very much brine leaked out of the barrels after being packed and before they were delivered to the transportation company for conveyance to the loading port?

Answer: None of the barrels leaked, except a few drops from several barrels damaged during transportation.

(b) Give your best estimate as to the percentage of brine that had leaked out.

Answer: Leakage too small to give an idea.

Twenty-third Cross-interrogatory:

(a) Did you see any or part of the said 2,955 barrels at [fol. 67] the port where they were placed on board the "Ansaldo."

Answer: No.

(b) If so, state how many barrels you saw.

Answer: None.

Twenty-fourth Cross-interrogatory:

(a) Give the date when you first saw them at the loading port.

Answer: I do not remember the exact date, but it was some time in July, 1920.

(b) Give the date when they were loaded on board the "Ansaldo."

Answer: About the middle of July, 1920.

Twenty-fifth Cross-interrogatory:

(a) When you first saw them at the loading port did they appear to have lost much of their brine?

Answer: No.

(b) If so, state what percentage of their brine you think they had [redacted]

Answer: [redacted] leakage. If so, only a few drops.

Twenty-sixth Cross-Interrogatory:

(a) How long did all or any part of the said barrels remain at the loading port before being loaded onto the steamer?

Answer: Only a few days.

(b) Were they lying under cover at the loading port or were they lying in the open? Describe in detail.

Answer: The barrels were transported direct from the railroad to the lighters, on which they remained until loaded on board ship.

[fol. 68] Twenty-seventh Cross-interrogatory:

(a) Is it true that some of the barrels showed signs of having leaked or of leaking at the time they were loaded on board the steamship "Ansaldo"?

Answer: I did not watch the loading of these barrels on the steamer, but I know that the seller of these barrels was under obligation to have on board a cooper for the special purpose of repairing all barrels which showed any signs of leakage, regardless of quantity, before they were placed in the hold.

(b) State how many showed signs of leakage, and—

(c) Give your estimate as to the percentage of brine that had leaked out of the barrels at that time, and—

(d) Number of barrels that showed such signs of leakage.

Answer: I do not know as I was not on board the "Ansaldo San Giorgio I" when the barrels were loaded.

(e) Did you or did you not inform Rheinstrom Brothers that some of the barrels showed signs of leakage at the time they were delivered to the ocean carrier?

Answer: Since all leaking barrels were repaired on board ship, it was not necessary to inform the Rheinstrom Brothers Company of any leakage, inasmuch as I had orders not to ship any leaking barrels.

Twenty-eighth Cross-interrogatory:

(a) Were any of the barrels reconditioned at the loading port?

Answer: Yes.

[fol. 69] (b) Did you open any of the barrels at the loading port to ascertain how much brine had leaked out of them?

Answer: It was unnecessary.

(c) If so, state how many barrels were so opened.

Answer: None.

(d) How many barrels showed signs of having leaked during their transportation to the loading port?

Answer: I do not know exactly but, if any, there were very few.

(e) State what was done to the barrels in reconditioning them at the loading port.

Answer: The cooper had to repair the damaged barrels and if there was a loss of water, he had to fill the barrel up again.

Twenty-ninth Cross-interrogatory:

(a) How many grades and/or kinds of cherries were packed into the said 2,955 barrels?

Answer: Three sizes: large, middle and small, mostly large.

(b) Describe each grade or kind.

Answer: The large size was from about 20 mm. and above; the middle from about 18 to 20, and the small from about 16 to 18.

Thirtieth Cross-interrogatory:

(a) How many barrels of cherries did you pack and/or inspect in June, July and August, 1920?

Answer: Several thousand.

(b) Give the name of the places where the same were packed.

[fol. 70] Answer: Besides Modena and Savona, also in Baiano, Maddaloni, Tufino.

(c) The dates of the packing.

Answer: From the end of May to the end of July, 1920.

(d) The dates of their shipment on board steamers.
Answer: Between June and July, 1920.

(e) The names of such steamers.
Answer: I do not remember the names of the steamers because all my papers are in Worms where possibly I could find them out.

Thirty-first Cross-interrogatory:

(a) Describe the marks and numbers on the various lots of barrels and/or casks that you packed during the months of June, July and August, 1920.
Answer: The marks were all "R. B. Cincinnati" except the barrels of Chisetti which were marked "U. G."

(b) Give the names of the shippers.
Answer: I think they were Bozzotti of Genoa and Fratelli Gondrand of Genoa, also Tagle at Naples.

(c) Give the names of the consignees.
Answer: The Rheinstrom Brothers Company.

Thirty-second Cross-interrogatory: What do you mean by the use of the word "tare" in the "Sixteenth interrogatory?
Answer: The weight of the empty barrel.

Thirty-third Cross-interrogatory:

(a) Did the master, agent or other representative of the [fol. 71] steamship "Ansaldo" give to the shippers a receipt other than the bill of lading for the said 2,955 barrels stating that the same were in apparent good external condition, or that the same were not in apparent good external condition?
Answer: No.

(b) If so, attach to your answers to these interrogatories true copies of the same.
Answer: No.

Thirty-fourth Cross-interrogatory: If in answer to any of the foregoing cross-interrogatories you state that you had anything to do with the packing of inspecting of barrels or casks of cherries during the months of June, July or August, 1920, other than those referred to in the interrogatories answered heretofore, state why it is that you remember these particular 2,955 barrels so well.

Answer: I remember the facts of the shipment of these 2,955 barrels so well because I was informed that there was a great loss. Besides that, it was the first year after the war that I again acted as purchaser and agent of the Rheinstrom Brothers Company. From my business records I may trace anything that I have done, at least, during the past 15 years.

Thirty-fifth Cross-interrogatory: Did you keep a record of the condition of the said 2,955 barrels and/or the condition of their contents and/or the condition of the brine at the time the same were packed and/or inspected.

Answer: A record was not necessary as I rejected all damaged barrels. Also the barrels, their contents and the brine met my usual requirements.

[fol. 72] Thirty-sixth Cross-interrogatory:

(a) Have you been testifying solely from memory as to the condition of these barrels and/or their contents, or have you been testifying as a result of having your memory refreshed from documents, data, paper or notes made either at the time the same were packed or inspected or made subsequent thereto?

Answer: As I rejected all damaged barrels it is easy to remember and, as I had no need of records, I am testifying from memory.

(b) If you have not been testifying from memory, state when such documents, data, paper and/or notes were prepared, and state—

(c) By whom such documents, data, papers and/or notes were made and attach copies of the same hereto.

Answer: I have no documents and so it is impossible to attach copies.

(d) If you have been testifying from memory solely state why it is that you remember this particular cargo so well.

Answer: For the reasons stated in answer to cross-interrogatory 34.

(e) Is it not true that you do not have any independent recollection of these 2,955 barrels but have testified concerning the same solely by reason of having your memory refreshed from certain documents, data, paper and/or notes

that were not prepared by you at the time the said barrels were being packed and/or inspected by you.

Answer: I am testifying by my memory and from my correspondence and I can state that such correspondence [fol. 73] did not exist at the time when said barrels were being packed and inspected by myself.

Thirty-seventh Cross-interrogatory: State which of the interrogatories and which of the cross-interrogatories you have answered as a result of information obtained from sources other than your own personal knowledge; that is, from what you actually saw or did.

Answer: I did not receive any other information except the fact of the loss of these barrels. All my answers are given by my own personal knowledge.

Thirty-eighth Cross-interrogatory: As to the 466 casks and/or barrels referred to in the "Twentieth" interrogatory, describe as you did in connection with your testimony concerning the 2,955 barrels—

(a) Where they were packed.

Answer: They were packed in Modena.

(b) When they were packed.

Answer: From the beginning of June until the beginning of July, 1920.

(c) How they were packed.

Answer: They were packed in good new barrels.

Thirty-ninth Cross-interrogatory:

(a) Describe the difference between the cherries packed in the said 466 casks and/or barrels and those packed in the 2,955 barrels.

Answer: There was no difference in quality.

(b) Describe in detail the difference in the method of packing the said 466 barrels and/or casks and that used [fol. 74] in packing the 2,955 barrels.

Answer: Same method of packing used.

(c) Describe in detail the difference in the method of curing the said 466 barrels and/or casks and that used in curing the 2,955 barrels.

Answer: The 466 barrels were new and therefore only paraffined, while the 2,955 barrels were cleaned before having been paraffined.

(d) Describe in detail the difference between the kind of solution of brine used in packing the 466 casks and that used in packing the 2,955 barrels.

Answer: Same kind of solution used in both cases.

(e) Describe in detail the difference in the method of preparing the said 466 casks and/or barrels to receive their contents and that method used in preparing the 2,955 barrels.

Answer: Same as 39 (c).

(f) What was in the difference in the amount of cherries placed in each of the said 466 casks and/or barrels and the amount of cherries placed in each of the said 2,955 barrels?

Answer: The contents of the 466 barrels were as follows: 21 barrels contained 230 kilos each; 230 barrels contained 182 kilos each; 15 barrels contained 148 kilos each; 200 barrels contained 35 kilos each; while the other 2,955 barrels contained 130 or 132 kilos each.

(g) What was the difference in the amount of brine placed in each of the said 466 casks and/or barrels and the amount of brine placed in each of the said 2,955 barrels?

Answer: In the lot of 466 barrels: 21 barrels contained [fol. 75] about 85 liters of brine; 230 barrels contained about 80 liters of brine; 15 barrels contained about 77 liters of brine; 200 barrels contained about 12 liters of brine.

(h) Describe the difference in the method of measuring the contents put in the said 466 casks and/or barrels and that of the said 2,955 barrels.

Answer: Method of measuring was always the same.

Fortieth Cross-interrogatory:

(a) Did you see the said 466 casks while they were in Genoa?

(b) If so, describe in detail their condition when you first saw them, giving the date when you first saw them, and

(c) Their condition when you last saw them, giving the date when you last saw them.

Answer: I do not remember, but some years ago in trying to get testimony from the Gondrand Company in Genoa, the President of said Company was willing to give it, while the Manager of the Shipping Department fearing the loss

of further business from the Ansaldo Company advised the President not to give it, saying that the giving of such information would be considered as giving out professional secrets. However, he told me that if the barrels had not been in a good condition they would not have been accepted by the Steamship Company.

Forty-first Cross-interrogatory:

(a) Did you see any or a part of said 466 casks and/or barrels at the port where they were placed on board the "Ansaldo" and

[fol. 76] (b) If so, state how many casks and/or barrels you saw.

Answer: I do not remember.

(c) At what port were the said 466 casks and/or barrels loaded on board the "Ansaldo"?

Answer: Genoa.

Forty-second Cross-interrogatory:

(a) Give the date when you first saw them at the loading port.

Answer: I do not remember.

(b) Give the date when they were loaded on board the "Ansaldo."

Answer: On or about the 15th or 20th of July, 1920.

Forty-third Cross-interrogatory:

(a) When you first saw them at the load port did they appear to have lost much of their brine?

Answer: I do not remember.

(b) If so, state what percentage of their brine you think they had lost.

Answer: This lot of 466 was handled in the same way as the 2,955 barrels, that is, if damaged they were repaired immediately.

Forty-fourth Cross-interrogatory:

(a) How long did all or any part of the said casks and/or barrels remain at the loading port before being loaded onto the steamer?

Answer: I do not think that it was more than 3 or 4 days.

(b) Were they lying under cover at the loading port or were they lying in the open; describe in detail?

[fol. 77] Answer: I am not sure but I think they were on a lighter of the shippers, Fratelli Gondrand.

Forty-fifth Cross-interrogatory:

(a) Is it true that some of the casks and/or barrels showed signs of having leaked or of leaking at the time they were loaded on board the steamship "Ansaldo"?

Answer: I did not watch the loading of these barrels on the steamer but I know that the seller of these barrels was under obligation to have on board a cooper for the special purpose of repairing such barrels which showed any sign of leakage, regardless of quantity, before they were placed in the hold.

(b) State how many showed signs of leakage.

Answer: Perhaps one or two were damaged through transportation.

(c) Give your estimate as to the percentage of brine that had leaked out of the casks and/or barrels at that time.

Answer: Only a few drops.

(d) Number of casks and/or barrels that showed such signs of leakage.

Answer: As stated under 45 (b).

(e) Did you or did you not inform Rheinstrom Brothers that some of the casks and/or barrels showed signs of leakage at the time they were delivered to the ocean carrier?

Answer: I did not inform Rheinstrom Brothers Company about any leakage because there were no barrels showing leakage. As stated before the seller and also the shipper were obligated to me personally to take care that no [fol. 78] barrels should be loaded into the hold if they were showing a leakage as little as one drop.

Forty-sixth Cross-interrogatory:

(a) Were any of the casks and/or barrels reconditioned at the loading port?

Answer: I do not believe that any barrels were reconditioned, but if so I do not think that it was more than one or two.

(b) Did you open any of the casks and/or barrels at the loading port to ascertain how much brine had leaked out of them?

Answer: No.

(c) If so, state how many casks and/or barrels were so opened.

Answer: None.

(d) How many casks and/or barrels showed signs of having leaked during their transportation to the loading port?

Answer: None.

(e) State what was done to the casks and/or barrels in reconditioning them at the loading port.

Answer: The damaged barrels were repaired and any loss of brine was replaced by sea water.

Forty-seventh Cross-interrogatory:

(a) How many grades and/or kinds of cherries were packed into the said 466 casks and/or barrels?.

Answer: They were mostly large cherries.

(b) Describe each grade or kind.

Answer: The cherries in question were quality "Duroni."

Forty-eighth Cross-interrogatory:

(a) Did the master, agent or other representative of the [fol. 79] steamship "Ansaldo" give to the shippers a receipt other than the bill of lading for the said 466 casks and/or barrels stating that the same were in apparent good external condition, or that the same were not in apparent good external condition?

Answer: Nothing is known to me about such a receipt.

(b) If so, attach to your answers to these interrogatories true copies of the same.

Answer: I have none.

Forty-ninth Cross-interrogatory:

(a) Did you keep a record of the condition of the said 466 casks and/or barrels and/or the condition of their contents and/or the condition of the brine at the time the same were packed and/or inspected?

Answer: I kept no record, because they were packed and inspected in the same way as the other cherries, that is, sound good quality, in good barrels, and the usual brine.

(b) Attach copies of the same hereto and appropriately mark them for identification.

Answer: I have none.

Fiftieth Cross-interrogatory: As to the 845 barrels referred to in the "Thirty-eighth" interrogatory, describe as you did in connection with your testimony concerning the 2,955 barrels.

(a) Where they were packed.

Answer: They were packed partly in Maddaloni Inferiore at the factory of Luigi Ceretto, and partly in the property of Ant. (?) Napoletano in Baiano.

(b) When they were packed.

Answer: Between the end of May until the end of June, 1920.

[fol. 80] (c) How they were packed.

Answer: In the same manner as was stated before.

Fifty-first Cross-interrogatory:

(a) Describe the difference between the cherries in the 845 barrels and those packed in the 2,955 barrels.

Answer: No difference.

(b) Describe in detail the difference in the method of packing the said 845 barrels and that used in packing the 2,955 barrels.

Answer: No difference.

(c) Describe in detail the difference in the method of curing the said 845 barrels and that used in curing the 2,955 barrels.

Answer: No difference.

(d) Describe in detail the difference between the kind of solution of brine used in packing the 845 barrels and that used in packing the 2,955 barrels.

Answer: No difference.

(e) Describe in detail the difference in the method of preparing the said 845 barrels to receive their contents and that method used in preparing the 2,955 barrels.

Answer: No difference.

(f) What was the difference in the amount of cherries placed in each of the said 845 barrels and the amount of cherries placed in each of the said 2,955 barrels.

Answer: No difference.

(g) What was the difference in the amount of brine placed in each of the said 845 barrels and the amount of [fol. 81] brine placed in each of the said 2,955 barrels.

Answer: No difference.

(h) Describe the difference in the method of measuring the contents put in the said 845 barrels and that of the said 2,955 barrels.

Answer: No difference.

Fifty-second Cross-interrogatory:

(a) Did you see the said 845 barrels while they were in Genoa?

(b) If so, describe in detail their condition when you first saw them, giving the date when you first saw them, and

(c) Their condition when you last saw them, giving the date when you last saw them.

Answer: The 845 barrels were not loaded in Genoa, but they were loaded in Naples. I do not remember if I saw this lot, so that I cannot state the dates when I first or last saw them at the port, or their condition at that time.

Fifty-third Cross-interrogatory:

(a) Did you see any or a part of the said 845 barrels at the port where they were placed on board the "Ansaldo" and

(b) If so, state how many barrels you saw.

Answer: I do not remember.

(c) At what port were the said 845 barrels loaded on board the "Ansaldo"?

Answer: They were loaded in Naples.

Fifty-fourth Cross-interrogatory:

(a) Give the date when you first saw them at the loading port.

[fol. 82] (b) Give the date when they were loaded on board the "Ansaldo."

Answer: I do not remember.

Fifty-fifth Cross-interrogatory:

(a) When you first saw them at the loading port did they appear to have lost much of their brine?

Answer: No.

(b) If so, state what percentage of their brine you think they had lost.

Answer: The percentage is so small that it cannot be expressed, because of their short trip to the port the loss could have been of a few drops only.

Fifty-sixth Cross-interrogatory:

(a) How long did all or any part of the said 845 barrels remain at the loading port before being loaded onto the steamer?

Answer: Only a few days, because we had taken care that the barrels arrived when the steamer was in the port.

(b) Were they lying under cover at the loaded port or were they lying in the open; describe in detail?

Answer: They were loaded on the lighter from the railroad cars, and it is possible that lighters were covered, but if not covered the barrels were moistened in the morning and evening.

Fifty-seventh Cross-interrogatory:

(a) Is it true that some of the barrels showed signs of having leaked or of leaking at the time they were loaded on board the steamship "Ansaldo"?

(b) State how many showed signs of leakage, and

[fol. 83] (c) Give your estimate as to the percentage of brine that had leaked out of the barrels at that time, and

(d) Number of barrels that showed such signs of leakage.

(e) Did you or did you not inform Rheinstrom Brothers that some of the barrels showed signs of leakage at the time they were delivered to the ocean carrier?

Answer: I do not believe that any barrels showed leakage when loaded on board the "Ansaldo," but if so, there were

no more than one or two, and they were repaired by the cooper on board ship before being placed in the hold, so it was not necessary to inform the Rheinstrom Brothers Company since no leaking barrels were loaded in the hold.

Fifty-eighth Cross-interrogatory:

(a) Were any of the barrels reconditioned at the loading port?

Answer: Answered in reply to cross-interrogatory No. 57.

(b) Did you open any of the barrels at the loading port to ascertain how much brine had leaked out of them?

Answer: No.

(c) If so, state how many barrels were so opened?

Answer: None.

(d) How many barrels showed signs of having leaked during their transportation to the loading port?

Answer: Only one or two.

(e) State what was done to the barrels in reconditioning them at the loading port.

[fol. 84] Answer: Answered in reply to cross-interrogatory No. 57.

Fifty-ninth Cross-interrogatory:

(a) How many grades and/or kinds of cherries were packed into the said 845 barrels?

Answer: There were three sizes: large, middle and small.

(b) Describe each grade or kind.

Answer: The large cherries were from 20 mm. and above; middle size from about 18 to 20; and small cherries from about 16 to 18 mm.

Sixtieth Cross-interrogatory:

(a) Did the master, agent or other representative of the steamship "Ansaldo" give to the shippers a receipt other than the bill of lading for the said 845 barrels stating that the same were in apparent good external condition?

Answer: Not to my knowledge.

(b) If so, attach to your answers to these interrogatories true copies of the same.

Answer: I have none.

Sixty-first Cross-interrogatory:

(a) Did you keep a record of the condition of the said 845 barrels and/or the condition of their contents and/or the condition of the brine at the time the same were packed and/or inspected?

Answer: I did not keep any records as it was unnecessary. I kept no record, because they were packed and inspected in the same way as the other cherries, that is, to meet our requirement of sound good quality and barrels in good condition.

(b) Attach copies of the same here to and appropriately mark them for identification.

Answer: I have none.

[fol. 85] Sixty-second Cross-interrogatory:

(a) With whom have you discussed the matters about which you have been testifying prior to the giving of your testimony?

Answer: I met my assistant, Mr. Gasperini, in Rome, as he came for the purpose of giving his testimony with me, but I state that my meeting with Mr. Gasperini had no influence and should have none, on his testifying.

(b) When did you discuss this matter last with Mr. Umberto Gasperini?

Answer: Answered under cross-interrogatory 62 (a).

Sixty-third Cross-interrogatory: Give the names of all persons who have been present in the room during the taking of all or a part of your testimony.

Answer: William Oscar Jones, Consul of the United States of America at Rome, Italy, and Vinzo de Massellis a clerk in the American Consulate General at Rome, Italy.

Sixty-fourth Cross-interrogatory:

(a) Have you ever seen or had read to you these cross-interrogatories or a translatio nthereof prior to giving your testimony?

Answer: No.

(b) If so, state when and where you saw them and/or had them read to you, and

(c) By whom they were shown or read to you.

(d) Had you been informed by anyone as to the nature of these cross-interrogatories?

Answer: Answered by cross-interrogatory 64 (a).

[fol. 86] Sixty-fifth Cross-interrogatory:

(a) Have you ever seen or had read to you the interrogatories or a translation thereof prior to giving your testimony?

Answer: Yes. I received a copy of the interrogatories from the lawyers of the Rheinstrom Brothers Company.

(b) If so, state when and where you saw them and/or had them read to you, and

(c) By whom they were shown or read to you.

(d) Had you been informed by anyone as to the nature of these interrogatories?

Answer: I received the copy of the interrogatories between the 15th and 20th of March, 1929, at my house in Worms, Germany, and I read them myself and was fully informed of the contents from the copy of the interrogatories which I received.

Interrogatories Propounded to Umberto Gasperini, a Witness on Behalf of the Libellant, and Answers Thereto

First Interrogatory: What is your name, age and present occupation?

Answer: My name is Umberto Gasperini. Age 44 years, and my present occupation is European representative of the Liberty Cherry and Fruit Company, of Covington, Kentucky.

Second Interrogatory: What was your occupation in May, June and July, 1920, and for how long had you been so employed?

Answer: During the months of May, June and July, 1920, I was employed by the Rheinstrom Brothers Com-
[fol. 87] pany, of Cincinnati, Ohio, as an assistant to Mr. August Kiefer. I had the same employment with this company from May 15th to October 15th of every year during the years 1919, 1920, 1922 and 1923.

Third Interrogatory: If you state that you were employed by The Rheinstrom Brothers Company, state in detail the nature of such employment.

Answer: My duties consisted of assisting Mr. August Kiefer, who is the European representative and purchasing agent for the Rheinstrom Brothers Company, in everything that was connected with this work.

Fourth Interrogatory: Did you have any connection with a lot of 2,955 barrels of cherries in brine purchased by The Rheinstrom Brothers Company from Societa Esportazione Agricola Ligure, and shipped at Naples on the steamship "Ansaldo San Giorgio I," in July, 1920, consigned to the First National Bank of Cincinnati at Philadelphia?

Answer: Yes, but I want to call your attention to the fact that those barrels were not shipped from Naples but from Genoa.

Fifth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in full your connection and duties with reference to said shipment.

Answer: I assisted in, or inspected and supervised the packing of the fruit and the shipment of the casks. In detail, my duties consisted of:

(a) watching the proper sulphuring of the fruit;

(b) the proper sorting of the fruit, so that only clear, sound, and whole cherries were selected and given to us; [fol. 88] (c) checking the weighing of the cherries when they were placed in the containers;

(d) watching the proper closing, filling up with the solution of sulphur water, and the sealing of every barrel;

(e) the loading of the barrels on the railroad cars;

(f) unloading from cars and reloading on lighters of the barrels at the port of shipment, so that no leaking or damaged barrels could leave the shipping point. Mr. Kiefer and I performed these duties either together or separately. In other words, one of us, or the two together, were always present.

Sixth Interrogatory: State, if you know: (a) where said cherries were prepared for shipment; (b) when said cherries were prepared for shipment.

Answer: (a) Said cherries were prepared for shipment at the following places: some in Savona, in the premises

located by the sea, formerly occupied by Societa Chinotti, some also in Savona at the plant of Societa Esportazione Agricola Ligure. Some in Modena at the plant of Carlo Venturelli & Co. A small number of said barrels were packed in Verona and Voghera, and these barrels were first shipped to the aforesaid premises of Societa Chinotti where all the lids were removed for the inspection of the fruit and the checking up of the weight.

(b) All these cherries were of the 1920 crop and were prepared for shipment from the latter part of May up to the end of June.

[fol. 89] Seventh Interrogatory: Were you present when said cherries were prepared for shipment?

Answer: Yes.

Eighth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state the process or processes through which the cherries were put in preparing them for shipment, enumerating, in order, the various steps taken until they were placed in containers for delivery to the railroad.

Answer: The cherries were first fumigated with sulphur, then spread on tables and carefully sorted so that all of the broken, dark, or otherwise damaged cherries were put aside. Then the good fruit was put into containers and weighed, after which the lid was put on and the barrel was filled up with a solution of sulphured water. The barrels so filled were marked "A. K." so that it would be easy to identify them at any time and place.

Ninth Interrogatory: Did you supervise or assist in supervising their preparation for shipment?

Answer: Yes. At times I supervised and at other times I assisted Mr. Kiefer.

Tenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your supervision.

Answer: In reply to this question I refer to my answer to the fifth interrogatory.

Eleventh Interrogatory: Did you inspect or assist in inspecting said cherries?

Answer: Yes.

[fol. 90] Twelfth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your inspection.

Answer: I have answered this question in detail in answer to interrogatory number 5.

Thirteenth Interrogatory: Did you act under anyone or cooperate with anyone in said work of supervision and inspection?

Answer: Yes:

Fourteenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state:

(a) The name of said party.

Answer: Mr. August Kiefer.

(b) The part taken by said party in said supervision and inspection.

Answer: We were doing the same kind of work and, as I stated before, we performed this work either together or separately but more frequently separately, because quite often we had packing of fruit going on at the same time in different places.

Fifteenth Interrogatory: State if you knew whether said cherries were weighed.

Answer: Yes, I know that they were weighed.

Sixteenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state whether said cherries were weighed before being placed in containers for shipment, or whether the containers were first weighed and then the containers and their contents weighed together and the tare subtracted.

[fol. 91] Answer: The empty containers were put on the scales and weighed, then the cherries were placed into them in such quantity as to have the scale register the right gross weight, that is to say, the net weight of fruit plus the weight of the container. Sellers, as a rule, always allow abundant weight of fruit and Mr. Kiefer and I saw to it that we were getting what was coming to us.

Seventeenth Interrogatory: Did you check the weight of said cherries and/or cherries and containers as they were weighed?

Answer: Yes, as I just stated in answer to your previous question.

Eighteenth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state how many kilos said cherries weighed, giving details.

Answer: 792 barrels each contained 130 kilos of net fruit, and 2,163 barrels each contained 132 kilos of net fruit.

Nineteenth Interrogatory:

(a) State, if you know, whether the amount of cherries described in your answer to the last preceding interrogatory was placed in containers and made ready for shipment on cars.

Answer: Yes, I know that the correct amount of cherries were placed in the containers made ready for shipment.

(b) If your answer to (a) is in the affirmative, describe the condition of said containers.

Answer: The containers were all in good condition, otherwise they would not have been accepted. If there was a [fol. 92] barrel leaking or not in sound condition, we had it repaired or changed.

(c) Were said containers making up said shipment of 2,955 barrels of different capacities?

Answer: They were all of about the same capacity.

Twentieth Interrogatory: If your answer to the Nineteenth Interrogatory (c) is in the affirmative, state the number of barrels of each capacity and give the total weight of the cherries contained in the barrels of each capacity together with the quality of said cherries.

Answer: All of the 2,955 barrels were of about the same capacity. In 2,163 barrels we put 130 kilos of net fruit. The two kilos difference was due to the fact that the 792 barrels contained Modena cherries, a variety which, being larger and harder, required more room. I may state that the quality of all the cherries was good.

Twenty-first Interrogatory: Did you have any connection with a lot of 466 casks and/or barrels of cherries in brine purchased by The Rheinstrom Brothers Company from Chisetti Antonio & Cia., and shipped at Genoa on the steamship "Ansaldo San Giorgio I" in July, 1920, consigned to order at Philadelphia?

Answer: I know of this deal, which was made by Mr. Kiefer with Messrs. Chisetti Antonio & Cia., of Modena, but Mr. Kiefer himself personally inspected and supervised

the packing, weighing, and so forth. The only thing I had to do with this shipment was that I looked over the barrels in Genoa at the time they were unloaded from the railroad cars and loaded on the lighters, and I found that they were all in sound condition.

[fol. 93] Twenty-second Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in full your connection and duties with reference to said shipment.

Answer: I answered this question fully in reply to your previous question.

Twenty-third Interrogatory: State, if you know: (a) where said cherries were prepared for shipment; (b) when said cherries were prepared for shipment.

Answer: The only thing I know is that they were prepared for shipment in Modena at the plant of Chisetti Antonio & Cia., but I do not know that exact date.

Twenty-fourth Interrogatory: Were you present when said cherries were prepared for shipment?

Answer: No.

Twenty-fifth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state the process or processes through which the cherries were put in preparing them for shipment, enumerating, in order, the various steps taken until they were placed in containers for delivery to the railroad.

Answer: My previous answer was in the negative so I have no reply to this question.

Twenty-sixth Interrogatory: Did you supervise or assist in supervising their preparation for shipment?

Answer: No.

Twenty-seventh Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe [fol. 94] in as much detail as possible, the nature of your supervision.

Answer: I can make no reply to this question.

Twenty-eighth Interrogatory: Did you inspect or assist in inspecting said cherries?

Answer: No.

Twenty-ninth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your inspection.

Answer: I had no connection with the inspection of these cherries.

Thirtieth Interrogatory: Did you act under anyone or cooperate with anyone in said work of supervision and inspection?

Answer: No.

Thirty-first Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state: (a) the name of said party; (b) the part taken by said party in said supervision and inspection.

Answer: I had nothing to do with this supervision and inspection.

Thirty-second Interrogatory: State if you know whether said cherries were weighed.

Answer: I do not know.

Thirty-third Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state whether said cherries were weighed before being placed in containers for shipment, or whether the containers were first weighed and then the containers and their contents weighed [fol. 95] together and the tare subtracted.

Answer: As I said before, I had nothing to do with the supervision and inspection of this lot.

Thirty-fourth Interrogatory: Did you check the weight of said cherries and/or cherries and containers as they were weighed?

Answer: I did not.

Thirty-fifth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state how many kilos said cherries weighed, giving details.

Answer: I have nothing to say.

Thirty-sixth Interrogatory: State, if you know, whether the amount of cherries described in your answers to the last preceding interrogatory was placed in containers and made ready for shipment on cars; (b) if your answer to (a) is in the affirmative, describe the condition of said con-

tainers; (c) were said containers making up said shipment of 466 casks and/or barrels of different capacities?

Answer: I had no connection with the weighing of this lot of cherries.

Thirty-seventh Interrogatory: If your answer to the thirty-sixth interrogatory (c) is in the affirmative, state the number of barrels of each capacity and give the total weight of the cherries contained in the barrels of each capacity together with the quality of said cherries.

Answer: My reply to the preceding question is sufficient answer.

[fol. 96] Thirty-eighth Interrogatory: Did you have any connection with the lot of 845 barrels of cherries in brine purchased by The Rheinstrom Brothers Company from Societa Esportazione Agricola Ligure and shipped at Naples on the steamship "Ansaldo San Giorgio I" in July 1920, consigned to order at New York?

Answer: Yes.

Thirty-ninth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in full your connection and duties with reference to said shipment.

Answer: I performed for this lot of 845 barrels the same duties as those mentioned in my answer to the fifth interrogatory.

Fortieth Interrogatory: State, if you know, (a) where said cherries were prepared for shipment.

Answer: Some of these cherries were prepared for shipment in the premises of Mr. Luigi Ceretto in Maddaloni Inferiore, and some in the premises of a certain Mr. Napoletano in Baiano. Both of these two places are located near Naples.

(b) When said cherries were prepared for shipment?

Answer: Said cherries were prepared for shipment in the latter part of May and the first half of June, 1920.

Forty-first Interrogatory: Were you present when said cherries were prepared for shipment?

Answer: Yes. Mr. Kiefer or I were present.

Forty-second Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state the

[fol. 97] process or processes through which the cherries were put in preparing them for shipment, enumerating, in order the various steps taken until they were placed in containers for delivery to the railroad.

Answer: We followed exactly the same procedure as outlined in my answer to your question number 8.

Forty-third Interrogatory: Did you supervise or assist in supervising their preparation for shipment?

Answer: Yes. Either Mr. Kiefer or I supervised the preparation of said cherries for shipment.

Forty-fourth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your supervision.

Answer: My duties in supervising were the same as stated by me in my answer to your fifth question.

Forty-fifth Interrogatory: Did you inspect or assist in inspecting said cherries?

Answer: Yes.

Forty-sixth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, describe in as much detail as possible, the nature of your inspection.

Answer: I did the same duties as stated in answer to your fifth question.

Forty-seventh Interrogatory: Did you act under anyone or cooperate with anyone in said work of supervision and inspection?

Answer: Yes.

[fol. 98] Forty-eighth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state:

(a) The name of said party.

Answer: Mr. August Kiefer.

(b) The part taken by said party in said supervision and inspection.

Answer: When he was present I assisted him in supervising and inspection. In other words, he was in charge of all such activities.

Forty-ninth Interrogatory: State if you know whether said cherries were weighed.

Answer: Yes, they were weighed.

Fiftieth Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state whether said cherries were weighed before being placed in containers for shipment, or whether the containers were first weighed and then the containers and their contents weighed together and the tare subtracted.

Answer: They were weighed in the same manner stated in my answer to your sixteenth question.

Fifty-first Interrogatory: Did you check the weight of said cherries and/or cherries and containers as they were weighed?

Answer: Yes, I checked the weight of said cherries and containers as they were weighed.

Fifty-second Interrogatory: If your answer to the last preceding interrogatory is in the affirmative, state how many kilos said cherries weighed, giving details.

Answer: Each of the 845 barrels had 132 kilos net fruit.

[fol. 99] Fifty-third Interrogatory:

(a) State, if you know, whether the amount of cherries described in your answer to the last preceding interrogatory was placed in containers and made ready for shipment on cars.

Answer: I do know that not less than 132 kilos net fruit were put in each one of the 845 barrels made ready for shipment.

(b) If your answer to "(a)" is in the affirmative, describe the condition of said containers.

Answer: All the containers were in sound and good condition.

(c) Were said containers making up said shipment of 845 barrels of different capacities?

Answer: All of these barrels were of about the same capacity.

Fifty-fourth Interrogatory: If your answer to the Fifty-third Interrogatory (c) is in the affirmative, state the number of barrels of each capacity and give the total weight of the cherries contained in the barrels of each capacity together with the quality of said cherries.

Answer: As I stated in my answer to the question just preceding, these 845 barrels were of about the same ca-

pacity, and the cherries placed in them were of prime quality, clear and sound.

Cross-interrogatories Propounded to Umberto Gasperini, and Answers Thereto

First Cross-interrogatory: If in answer to the "Fourth" interrogatory you say you recall "2,955 barrels of cherries in brine * * * shipped at Naples on the steamship 'Ansaldo San Giorgio I' in July, 1920," state if you saw [fol. 100] the said cargo at Naples prior to being loaded on the aforementioned steamer.

Answer: I should first like to state that the 2,955 barrels in question were not shipped from Naples but from Genoa. I saw all or at least a part of this shipment prior to being loaded on the "Ansaldo San Giorgio I."

Second Cross-Interrogatory: State:

(a) If you saw the said steamer in the port of Naples.

Answer: I saw the said steamer laying in the port of Genoa.

(b) If you saw her being loaded with the barrels in question, state

(c) Whether the said vessel was then lying at a pier or at anchor.

Answer: I did not see this steamer being loaded with the barrels in question, but I saw the vessel when it was laying at anchor.

(d) If the said vessel loaded the said barrels directly from a pier or from lighters.

Answer: I know that the barrels were loaded from lighters, although I did not see it done.

(e) In what position the said steamer was lying.

Answer: At anchor.

Third Cross-interrogatory:

(a) Did you act as Rheinstrom's agent or representative in negotiating with the shipper for the buying of the said 2,955 barrels?

Answer: No.

(b) What did you have to do with the buying or purchasing of the said barrels?

Answer: Nothing.

[fol. 101] Fourth Cross-interrogatory:

(a) Did you act as agent or representative for Rheinstrom Brothers in connection with the packing or inspecting of the said 2,955 barrels?

Answer: Yes, I acted as assistant to Mr. August Kiefer.

(b) Who were you employed by in June, July and August, 1920?

Answer: By the Rheinstrom Brothers Company.

(c) Were you employed by the shipper of the said 2,955 barrels or were you employed by Rheinstrom Brothers or were you employed by someone else, and, if so, state who?

Answer: I was employed by Rheinstrom Brothers Company directly.

Fifth Cross-interrogatory:

(a) Did you see any or a part of the 2,955 barrels while they were still empty, that is, before the cherries in brine were put into them?

Answer: Yes.

(b) If so, describe in full detail their condition.

Answer: These barrels were in good condition.

(c) Had they ever been used before as containers of any other liquids?

Answer: To my knowledge they were previously used as containers for mineral oil.

(d) Prior to having the cherries in brine placed in them had they been cleaned, and, if so, describe in the fullest detail how they had been cleaned.

Answer: Yes, they were cleaned. They were first burned inside and then slightly scraped in order to remove the carbon after which they were paraffined.

[fol. 102] (e) If you state that they had been cleaned state what, if anything, was done to them before the cherries were put into them.

Answer: As I just stated in answer to your previous question.

(f) Describe in detail how they were prepared to receive the cherries.

Answer: The same answer applies that I gave to question number 5 (d).

(g) State in full the reasons why they were prepared as you have described them.

Answer: In order to remove the oil that may have been left in the barrel.

(h) Give the date when you first saw these barrels and describe their condition at that time.

Answer: I first saw these barrels during the time when they were packed, that is to say, during the month of June, 1920.

(i) Give the date when the packing commenced and describe in detail the condition of the barrels at that time.

Answer: Packing commenced about the beginning of June, 1920, and lasted all of that month and, to the best of my knowledge, the barrels were in good condition at that time.

Sixth Cross-interrogatory:

(a) Give the date when the packing of the said 2,955 barrels was commenced.

Answer: About the end of May or during the first few days of June, 1920.

(b) Give the date when the packing of the said 2,955 barrels was finished.

Answer: About the end of June, 1920.

[fol. 103] (c) Give the date when the heads of said barrels were finally put in or they were finally closed and ready for shipment.

Answer: The heads were put on the same day they were packed.

(d) Describe in full detail how they were closed and made ready for delivery to the carrier.

Answer: After the heads had been put on the barrels were filled up with sulphur water and then they were closed.

Seventh Cross-interrogatory:

(a) In what locality, giving the name of the city, town or district, were the barrels in question packed?

Answer: Some of them were packed in Savona, some of them in Modena, and some others in Verona and Voghera.

(b) Were the said barrels packed in a building, such as a factory, shed, or the like, and, if so, describe such place in full detail?

Answer: Some of them were packed in the premises formerly occupied by Societa Chinotti at Savona, which consisted of a large covered building and covered sheds in the court yard. Others were packed at Verona and Voghera, but all of the barrels packed in these two cities were brought to the premises of Societa Chinotti at Savona where they were opened for inspection. Others were also packed in Savona at the plant of Societa Agricola Esportazione Ligure, which plant consisted of a number of large covered sheds. Others were also packed in Modena at the plant of Carlo Venturelli & Cia., which had a covered building and a large court yard with a temporary covering.

[fol. 104] Eighth Cross-interrogatory:

(a) State when you first saw the cherries prior to their being packed in the barrels in question.

Answer: I first saw the cherries when they came out of the fumigation room just prior to their being packed.

(b) Were they green, that is, fresh from the trees, or—

Answer: They were fresh from the trees, but they had already turned yellow from the action of the sulphur.

(c) Were they dried or otherwise prepared for packing?

Answer: The fresh fruit was only fumigated with sulphur.

(d) Was anything done to the said cherries prior to being packed?

Answer: Yes.

(e) If so, describe in detail just what was done to them before they were placed in the barrels.

Answer: They were first spread on tables and sorted by size and the dark and rotten fruit was taken away. This work was done after the cherries came out of the fumigation room and then they were placed in the barrels, which was all done during the same day.

Ninth Cross-interrogatory: Were the said cherries subjected to (a) heat, or—

Answer: These cherries were not subjected to heat.

(b) Chemicals of any kind, prior to being placed in the barrels.

Answer: The only chemical process was their fumigation with sulphur.

[fol. 105] Tenth Cross-interrogatory:

(a) After the cherries were put in the barrels was any solution of any kind placed over them, and, if so—
Answer: Yes.

(b) State of what it was composed, that is—
Answer: Sulphured water, which was sometimes strengthened with either sulphurous anhydride or bysulphite of sodium.

(c) Give the chemical analysis of such solution, and—
Answer: The solution consisted of solely sulphured water which, as I just stated, was sometimes strengthened with sulphurous anhydride or bysulphite of sodium.

(d) Describe how this solution was put over the cherries.
Answer: This solution mixed with water was put over the cherries through the bung hole.

Eleventh Cross-interrogatory:

(a) Was the same quantity of cherries put in each of the said 2,955 barrels and if not—
Answer: About the same quantity of cherries was put into each barrel.

(b) State what quantity was put in each barrel.
Answer: 792 barrels each contained 130 kilos of net fruit and 2,163 each contained 132 kilos of net fruit.

(c) What kind of measure, scales or other implement was used to measure or weigh out the quantity of cherries that was placed in each barrel, and—
Answer: A centesimal scale.

[fol. 106] (d) Describe the same in detail.
Answer: It was the usual type of centesimal scale.

Twelfth Cross-interrogatory:

(a) How many pounds or kilograms of cherries were placed in each barrel?
Answer: The same as stated in reply to your question number 11 (a).

(b) How many pounds or kilograms of liquid was placed over the cherries after they were put in the barrel?

Answer: I am not positive, but I think it was from about 65 to 70 kilos of liquid.

(c) Were you present when the cherries were put into each of the said 2,955 barrels?

Answer: Either Mr. Kiefer or I, individually or together, were present when the cherries were put into the said barrels.

(d) Did you personally see the amount of cherries that was put into each barrel?

Answer: Either Mr. Kiefer or I saw them filled.

(e) If not, in how many barrels did you actually see them placed?

Answer: I do not know how many barrels I personally saw filled with cherries.

Thirteenth Cross-interrogatory:

(a) After the cherries were put in the barrels were the barrels completely filled with "brine" or some other solution?

Answer: After the cherries were put into the barrels, the barrels were filled almost to the top with solution and then [fol. 107] about four kilos of salt in grain were put into each barrel.

(b) If you say that the said barrels were not completely filled with cherries and brine state to what percent. the barrels were filled.

Answer: They were completely filled.

Fourteenth Cross-interrogatory: If you state that brine was used in packing the cherries in the barrels and have not already done so give (a) the ingredients of the said brine; (b) the chemical analysis of each ingredient and the percentage of each ingredient that went to make up the said brine.

Answer: I have explained the brine to the best of my ability in answer to your question number 10.

Fifteenth Cross-interrogatory:

(a) Did you make a chemical test or any other kind of a test to ascertain what the said brine contained and the percentage of its ingredients?

Answer: I made no chemical test. I tested the brine either by smelling or tasting it.

(b) If not, from what source did you obtain the information given above.

Answer: While I made tests only by smelling or tasting the brine, I may state that the sellers of the cherries occasionally had chemists make the chemical tests.

Sixteenth Cross-interrogatory:

(a) Why was brine placed on the cherries?

Answer: In order to preserve them.

[fol. 108] (b) If brine had not been placed on the cherries in about how many days would they have commenced to decay?

Answer: That would depend on the climate and the exposure of the barrels to the heat of the sun.

(c) If brine had not been placed on the cherries of the chemical analysis described by you above, would they have decayed after a certain period?

Answer: Sure.

(d) Would the period within which the cherries might decay depend upon whether there was or was not any brine placed on them?

Answer: Although the fumigation would preserve the cherries for a certain length of time, if no brine had been used the cherries would decay much sooner.

(e) Would the period within which the cherries might decay depend upon the strength or weakness of the brine placed upon them?

Answer: Yes, I would say to a certain degree.

(f) If you have stated that the brine consists of a saline solution of one character or another, state what would be the minimum percentage of salt or salts that it should contain in order to prevent the decaying of cherries that might remain in barrels for at least two months.

Answer: I think that the minimum percentage of salt would be about 3 per cent, but I am not positive about this.

Seventeenth Cross-interrogatory:

(a) How were the said 2,955 barrels marked?

[fol. 109] Answer: On one head there was the trade mark

of the shipper, and on the other the initials "R. B. Cincinnati".

(b) Describe in detail just exactly how they were marked.

Answer: As I just stated in answer to your preceding question. However, I might add that the initials "A. K." were marked on the bung stave of every barrel for identification.

(c) Attach hereto on a separate sheet of paper a reproduction of the said marks.

Answer: While I do not remember the seller's trade mark well enough to give a reproduction of it, I do remember that the buyer's mark was "R. B. Cincinnati", which was put on one head of the barrel in black paint with the use of a stencil.

(d) State in full detail how it happens that you can remember at this late date the information that you have just given.

Answer: I may state that I remember all things in particular because as soon as this shipment arrived in the United States the damage was ascertained by the Rheinstrom Brothers and I was informed about it when I went back to Cincinnati in October, 1920.

Eighteenth Cross-interrogatory: Describe in detail the method of heading, fastening or closing the said barrels after the cherries in brine were placed in them to prevent leakage of contents.

Answer: The cooper put on the heads and then tightened them by pushing down the hoops with a hammer. If he saw that there was a crack or light showing between the [fol. 110] staves, which might cause a leakage, he would seal it with club-rush and some times also with cotton. Then he would see if there was any leakage.

Nineteenth Cross-interrogatory:

(a) Did all of the said 2,955 barrels leave the place where they were packed, or the places where they were packed, at the same time?

Answer: All of the said 2,955 barrels left the places where they were packed at about the same time, or during a period of two or three days.

(b) Give the dates when and the number of barrels that left the place of packing on each date.

Answer: I do not remember the dates or the number of barrels that left the packing places on each date.

(c) Describe in detail what kind of conveyance was used in conveying them from their place of packing.

Answer: From the factory to the depot they were conveyed either with automobile trucks or wagons, and from there to Genoa by railroad.

Twentieth Cross-interrogatory: How many English miles is it from the place or places where the said 2,955 barrels were packed to the place where they were loaded on board the steamship "Ansaldo San Giorgio I"?

Answer: It is about 175 English miles from Modena to Genoa and about 25 English miles from Savona to Genoa.

Twenty-first Cross-interrogatory: If you have not already done so, describe in detail the kind of conveyances that were used in transporting the said 2,955 barrels from [fol. 111] the place or places where they were packed to the port where they were loaded on board the "Ansaldo".

Answer: As I stated in reply to your question number 19.

Twenty-second Cross-interrogatory:

(a) Had very much brine leaked out of the barrels after being packed and before they were delivered to the transportation company for conveyance to the loading port?

Answer: No, because they were kept open for refilling up to the time they were delivered to the railroad.

(b) Give your best estimate as to the percentage of brine that had leaked out.

Answer: None.

Twenty-third Cross-interrogatory:

(a) Did you see any or a part of the said 2,955 barrels at the port where they were placed on board the "Ansaldo"?

Answer: I saw them at the port as they were being loaded on lighters.

(b) If so, state how many barrels you saw.

Answer: I cannot state the exact number, but virtually I saw practically all of them.

Twenty-fourth Cross-interrogatory:

(a) Give the date when you first saw them at the loading port.

Answer: I do not remember the exact date, but it was about the 15th of July, 1920.

(b) Give the date when they were loaded on board the "Ansaldo".

Answer: I do not know.

[fol. 112] Twenty-fifth Cross-interrogatory:

(a) When you first saw them at the loading port did they appear to have lost much of their brine?

Answer: No.

(b) If so, state what percentage of their brine you think they had lost?

Answer: If any brine was lost, the amount was too small to quote in percentage. The cooper was always present and when he saw a barrel that showed leakage he fixed it immediately.

Twenty-sixth Cross-interrogatory:

(a) How long did all or any part of the said barrels remain at the loading port before being loaded onto the steamer?

Answer: I do not know exactly, but I think that they did not stay there any longer than a day or two.

(b) Were they lying under cover at the loading port or were they lying in the open; describe in detail?

Answer: I do not remember.

Twenty-seventh Cross-interrogatory:

(a) Is it true that some of the barrels showed signs of having leaked or of leaking at the time they were loaded on board the steamship "Ansaldo"?

Answer: I do not know because I did not see them as they were being loaded on board the steamship "Ansaldo".

(b) State how many showed signs of leakage.

Answer: I do not know.

(c) Give your estimate as to the percentage of brine that had leaked out of the barrels at that time.

Answer: I do not know.

[fol. 113] (d) Number of barrels showed such signs of leakage.

Answer: I do not know.

(e) Did you or did you not inform Rheinstrom Brothers that some of the barrels showed signs of leakage at the time they were delivered to the ocean carrier?

Answer: I did not know anything about leakage and therefore could not inform Rheinstrom Brothers.

Twenty-eighth Cross-interrogatory:

(a) Were any of the barrels reconditioned at the loading port?

Answer: Yes, a few of them.

(b) Did you open any of the barrels at the loading port to ascertain how much brine had leaked out of them?

Answer: No, I did not.

(c) If so, state how many barrels were so opened.

Answer: None by me.

(d) How many barrels showed signs of having leaked during their transportation to the loading port?

Answer: I do not remember exactly the number, but I may state that there were very few, not over twenty barrels.

(e) State what was done to the barrels in reconditioning them at the loading port.

Answer: They were repaired with club-rush and cotton to stop any of the leaks.

Twenty-ninth Cross-interrogatory:

(a) How many grades and/or kinds of cherries were packed into the said 2,955 barrels?

[fol. 114] Answer: To the best of my recollection, all of the cherries in the 2,955 barrels were first grade fruit.

(b) Describe each grade or kind.

Answer: My preceding reply answers this question.

Thirtieth Cross-interrogatory:

(a) How many barrels of cherries did you pack and/or inspect in June, July and August, 1920?

Answer: I inspected from about 4,500 to 5,000 barrels of cherries during the period mentioned.

(b) Give the names of the places where the same were packed.

Answer: Naples, Modena, Savona, Maddaloni, Baiano.

(c) The dates of the packing.

Answer: From May 20th up to first part of August, 1920.

(d) The dates of their shipment on board steamers.

Answer: I do not remember the shipping dates.

(e) The names of such steamers.

Answer: I do not remember the names of the steamers, because Mr. Kiefer personally attended to the shipping of the cherries.

Thirty-first Cross-interrogatory:

(a) Describe the marks and numbers on the various lots of barrels and or casks that you packed during the months of June, July and August, 1920.

Answer: As far as I can remember, one end of the barrels bore the mark "R. B. Cincinnati", and the other end bore the seller's trade mark.

[fol. 115] (b) Give the names of the shippers.

Answer: Societa Agricola Esportazione Ligure, Ghisetti Antonio & Cia., and Saverio Bellofatto, are the only ones I can remember.

(c) Give the names of the consignees.

Answer: The consignee was Rheinstrom Brothers Company.

Thirty-second Cross-interrogatory: What do you mean by the use of the word "tare" in the "Sixteenth" interrogatory?

Answer: I understand "tare" to mean the weight of the empty barrel.

Thirty-third Cross-interrogatory:

(a) Did the master, agent or other representative of the steamship "Ansaldo" give to the shippers a receipt other than the bill of lading for the said 2,955 barrels stating that the same were in apparent good external condition, or that the same were not in apparent good external condition?

Answer: I do not know.

(b) If so, attach to your answers to these interrogatories true copies of the same.

Answer: I have none.

Thirty-fourth Cross-interrogatory: If in answer to any of the foregoing cross-interrogatories you state that you had anything to do with the packing or inspecting of barrels or casks of cherries during the months of June, July or August, 1920, other than those referred to in the interrogatories answered heretofore, state why it is that you remember these particular 2,955 barrels so well.

Answer: As I stated before, because when I got back to Cincinnati in October, 1920, the Rheinstrom Brothers in- [fol. 116] formed me that the shipment had arrived in damaged condition.

Thirty-fifth Cross-interrogatory: Did you keep a record of the condition of the said 2,955 barrels and/or the condition of their contents and/or the condition of the brine at the time the same were packed and/or inspected.

Answer: I did not keep any record.

Thirty-sixth Cross-interrogatory:

(a) Have you been testifying solely from memory as to the condition of these barrels and/or their contents, or have you been testifying as a result of having your memory refreshed from documents, data, paper or notes made either at the time the same were packed or inspected or made subsequent thereto?

Answer: I have been testifying solely from memory from what I was told about this damaged shipment when I got back to America in October, 1920, and also from my personal connection in Italy with this shipment.

(b) If you have not been testifying from memory, state when such documents, data, paper and/or notes were prepared, and state——

Answer: I was furnished no documents.

(c) By whom such documents, data papers and/or notes were made and attach copies of the same hereto.

Answer: Answered by my reply to your question number 36 (b).

(d) If you have been testifying from memory solely state why it is that you remember this particular cargo so well.

[fol. 117] Answer: As I stated several times before, my attention was called to the damage to this shipment by the Rheinstrom Brothers Company when I returned to America in October, 1920.

(c) Is it not true that you do not have any independent recollection of these 2,955 barrels but have testified concerning the same solely by reason of having your memory refreshed from certain documents, data, paper and/or notes that were not prepared by you at the time the said barrels were being packed and/or inspected by you?

Answer: My reply to the question immediately preceding also answers this question.

Thirty-seventh Cross-interrogatory: State which of the interrogatories and which of the cross-interrogatories you have answered as a result of information obtained from sources other than your own personal knowledge, that is, from what you actually saw or did.

Answer: None.

Thirty-eighth Cross-interrogatory. As to the 466 casks and/or barrels referred to in the "Twentieth" interrogatory, describe as you did in connection with your testimony concerning the 2,955 barrels—

(a) Where they were packed.

Answer: They were packed in Modena at the plant of Ghisetti Antonio & Cia.

(b) When they were packed.

Answer: During the month of June, 1920.

(c) How they were packed.

Answer: I was not present when this lot was packed, but [fol. 118] I know that they were packed in barrels and casks.

Thirty-ninth Cross-interrogatory:

(a) Describe the difference between the cherries packed in the said 466 casks and/or barrels and those packed in the 2,955 barrels.

Answer: The cherries packed in the 466 casks and barrels were of the "Duroni" variety, grown in the vicinity of Modena, which is a harder and larger kind of cherry than those packed in the 2,955 barrels, although this lot also contained about 800 barrels of the "Duroni" cherries.

(b) Describe in detail the difference in the method of packing the said 466 barrels and/or casks and that used in packing the 2,955 barrels.

Answer: I was not present when the 466 casks and barrels were packed, but I know that they were prepared with the same process as the 2,955 barrels.

(c) Describe in detail the difference in the method of curing the said 466 barrels and/or casks and that used in curing the 2,955 barrels.

Answer: To my knowledge there was no difference in the curing method.

(d) Describe in detail the difference between the kind of solution of brine used in packing the 466 casks and that used in packing the 2,955 barrels.

Answer: As far as I know the same kind of solution was used for both lots of cherries.

(e) Describe in detail the difference in the method of preparing the said 466 casks and/or barrels to receive their contents and that method used in preparing the 2,955 barrels.

[fol. 119] Answer: As I was not present I do not know if there was any difference.

(f) What was the difference in the amount of cherries placed in each of the said 466 casks and/or barrels and the amount of cherries placed in each of the said 2,955 barrels?

Answer: I know there was some difference, but I do not know the amounts.

(g) What was the difference in the amount of brine placed in each of the said 466 casks and/or barrels and the amount of brine placed in each of the said 2,955 barrels.

Answer: I do not know.

(h) Describe the difference in the method of measuring the contents put in the said 466 casks and/or barrels and that of the said 2,955 barrels.

Answer: I was not present and therefore I cannot answer this question.

Fortieth Cross-interrogatory:

(a) Did you see the said 466 casks while they were in Genoa?

Answer: Yes.

(b) If so, describe in detail their condition when you first saw them, giving the date when you first saw them, and—

Answer: The condition of the 466 barrels and casks was good when I saw them at Genoa around the middle of July, 1920.

(c) Their condition when you last saw them, giving the date when you last saw them.

Answer: I saw this lot only once and that was when they were being unloaded from the railroad cars and being reloaded on the lighters, which was in July, 1920, at Genoa.

[fol. 120] Forty-first Cross-interrogatory:

(a) Did you see any or a part of the said 466 casks and/or barrels at the port where they placed on board the "Ansaldo"?

Answer: Yes.

(b) If so, state how many casks and/or barrels you saw.

Answer: I saw all of these 466 casks and barrels.

(c) At what port were the said 466 casks and/or barrels loaded on board the "Ansaldo"?

Answer: They were loaded on board the "Ansaldo" in Genoa.

Forty-second Cross-interrogatory:

(a) Give the date when you first saw them at the loading port.

Answer: Around the middle of July, 1920.

(b) Give the date when they were loaded on board the "Ansaldo".

Answer: I do not know exactly, but I remember that it was around the middle of July, 1920.

Forty-third Cross-interrogatory:

(a) When you first saw them at the loading port did they appear to have lost much of their brine.

Answer: No.

(b) If so, state what percentage of their brine you think they had lost.

Answer: With the exception of perhaps ten barrels that were damaged during railroad transportation, all of the other barrels and casks were in perfect condition. Those

barrels that were damaged were immediately repaired and refilled with salt water.

[fol. 121] Forty-fourth Cross-interrogatory:

(a) How long did all or any part of the said casks and/or barrels remain at the loading port before being loaded onto the steamer?

Answer: I do not know exactly, but I know that they did not stay in the port more than a day or two before being loaded on the steamer.

(b) Were they lying under cover at the loading port or were they lying in the open? Describe in detail.

Answer: I do not know if they were lying under cover or not as the lighters were moved away as fast as they were filled with the barrels and casks.

Forty-fifth Cross-interrogatory:

(a) Is it true that some of the casks and/or barrels showed signs of having leaked or of leaking at the time they were loaded on board the steamship "Ansaldo"?

Answer: I do not know because I was not present.

(b) State how many showed signs of leakage.

Anwser: I do not know.

(c) Give your estimate as to the percentage of brine that had leaked out of the casks and/or barrels at that time.

Answer: I do not know.

(d) Number of casks and/or barrels that showed such signs of leakage.

Answer: I do not know.

(e) Did you or did you not inform Rheinstrom Brothers that some of the casks and/or barrels showed signs of leakage at the time they were delivered to the ocean carrier?

Answer: I did not.

[fol. 122] Forty-sixth Cross-interrogatory:

(a) Were any of the casks and/or barrels reconditioned at the loading port?

Answer: Yes, about 10 that had been slightly damaged.

(b) Did you open any of the casks and/or barrels at the loading port to ascertain how much brine had leaked out of them?

Answer: No, I did not.

(c) If so, state how many casks and/or barrels were so opened.

Answer: None.

(d) How many casks and/or barrels showed signs of having leaked during their transportation to the loading port?

Answer: As I stated before, only about 10 barrels showed any sign of leakage which was caused during the transportation on the railroad.

(e) State what was done to the casks and/or barrels in reconditioning them at the loading port.

Answer: The cooper fixed them with cotton and club-rush.

Forty-seventh Cross-interrogatory:

(a) How many grades and/or kinds of cherries were packed into the said 466 casks and/or barrels?

Answer: I do not know.

(b) Describe each grade or kind.

Answer: I do not know the grades or kinds packed in this lot.

Forty-eighth Cross-interrogatory:

(a) Did the master, agent or other representative of the steamship "Ansaldo" give to the shippers a receipt other than the bill of lading for the said 466 casks and/or barrels [fol. 123] stating that the same were in apparent good external condition, or that the same were not in apparent good external condition.

Answer: I do not know.

(b) If so, attach to your answers to these interrogatories true copies of the same.

Answer: I have none.

Forty-ninth Cross-interrogatory:

(a) Did you keep a record of the condition of the said 466 casks and/or barrels and/or the condition of their contents and/or the condition of the brine at the time the same were packed and/or inspected?

Answer; No, I kept no record.

(b) Attach copies of the same hereto and appropriately mark them for identification.

Answer: I have none.

Fiftieth Cross-interrogatory: As to the 845 barrels referred to in the "Thirty-eighth" interrogatory, describe as you did in connection with your testimony concerning the 2,955 barrels—

(a) Where they were packed.

Answer: Some of them were packed at Madaloni, and the others in Baiano.

(b) When they were packed.

Answer: They were packed from about May 20th up to the first part of June, 1920.

(c) How they were packed.

Answer: They were packed in barrels in the same manner as the other lots.

[fol. 124] Fifty-first Cross-interrrogatory:

(a) Describe the difference between the cherries packed in the 845 barrels and those packed in the 2,955 barrels.

Answer: There was no difference in the cherries packed in the 845 barrels and those packed in the 2,955 barrels.

(b) Describe in detail the difference in the method of packing the said 845 barrels and that used in packing the 2,955 barrels.

Answer: There was no difference in the method of packing.

(c) Describe in detail the difference in the method of curing the said 845 barrels and that used in curing the 2,955 barrels.

Answer. There was no difference in the method of curing.

(d) Describe in detail the difference between the kind of solution of brine used in packing the 845 barrels and that used in packing the 2,955 barrels.

Answer: There was no difference in the solution used.

(e) Describe in detail the difference in the method of preparing the said 845 barrels to receive their contents and that method used in preparing the 2.955 barrels.

Answer: There was no difference in the preparation of the barrels.

(f) What was the difference in the amount of cherries placed in each of the said 845 barrels and the amount of cherries placed in each of the said 2,955 barrels?

Answer: All of the 845 barrels each contained 132 kilos of net fruit, while 792 barrels of the 2,955 lot each contained [fol. 125] 130 kilos of net fruit and the balance of 132 kilos of net fruit.

(g) What was the difference in the amount of brine placed in each of the said 845 barrels and the amount of brine placed in each of the said 2,955 barrels?

Answer: There was no difference in the amount of brine placed in the barrels of these two lots.

(h) Describe the difference in the method of measuring the contents put in the said 845 barrels and that of the said 2,955 barrels.

Answer: There was no difference in the method of measuring the contents of the barrels in those two lots.

Fifty-second Cross-interrogatory:

(a) Did you see the said 845 barrels while they were in Genoa?

Answer: I do not remember having seen this lot of 845 barrels at the port of shipment, but I want to add that they were shipped from Naples and not Genoa.

(b) If so, describe in detail their condition when you first saw them, giving the date when you first saw them, and——

Answer: I remember nothing about their condition.

(c) Their condition when you last saw them, giving the date when you last saw them.

Answer: I do not remember seeing them at the port of shipment.

Fifty-third Cross-interrogatory:

(a) Did you see any or a part of the said 845 barrels at [fol. 126] the port where they were placed on board the "Ansaldo" and—

Answer: I do not remember.

(b) If so, state how many barrels you saw.

Answer: I do not remember.

(c) At what port were the said 845 barrels loaded on board the "Ansaldo"?

Answer: They were loaded on board the "Ansaldo" at Naples.

Fifty-fourth Cross-interrogatory:

(a) Give the date when you first saw them at the loading port.

Answer: I do not remember.

(b) Give the date when they were loaded on board the "Ansaldo".

Answer: Although I do not remember having been present, I know that they were loaded around the end of July, 1920.

Fifty-fifth Cross-interrogatory:

(a) When you first saw them at the loading port did they appear to have lost much of their brine?

Answer: I do not remember having seen them.

(b) If so, state what percentage of their brine you think they had lost.

Answer: I do not know.

Fifty-sixth Cross-interrogatory:

(a) How long did all or any part of the said 845 barrels remain at the loading port before being loaded onto the steamer?

Answer: I do not know.

(b) Were they lying under cover at the loading port [fol. 127] or were they lying in the open; describe in detail.

Answer: I do not know.

Fifty-seventh Cross-interrogatory:

(a) Is it true that some of the barrels showed signs of having leaked or of leaking at the time they were loaded on board the steamship "Ansaldo"?

Answer: I do not know.

(b) State how many showed signs of leakage.

Answer: I do not know.

(c) Give your estimate as to the percentage of brine that had leaked out of the barrels at that time.

Answer: I do not know.

(d) Number of barrels that showed such signs of leakage.

Answer: I do not know.

(e) Did you or did you not inform Rheinstrom Brothers that some of the barrels showed signs of leakage at the time they were delivered to the ocean carrier?

Answer: No, I did not

Fifty-eighth Cross-interrogatory:

(a) Were any of the barrels reconditioned at the loading port?

Answer: I do not know.

(b) Did you open any of the barrels at the loading port to ascertain how much brine had leaked out of them?

Answer: No, I did not.

(c) If so, state how many barrels were so opened.

Answer: None, by me.

[fol. 128] (d) How many barrels showed signs of having leaked during their transportation to the loading port?

Answer: I do not remember.

(e) State what was done to the barrels in reconditioning them at the loading port.

Answer: I do not know.

Fifty-ninth Cross-interrogatory:

(a) How many grades and/or kinds of cherries were packed into the said 845 barrels.

Answer: Only first grade fruit was packed in this lot of 845 barrels, and I do not remember whether there were a few barrels containing second choice fruit, if so, there were only from 20 to 30 barrels of such second grade fruit.

(b) Describe each grade or kind.

Answer: I have no further description to make to what I have just said in answer to question number 59 (a).

Sixtieth Cross-interrogatory:

(a) Did the master, agent or other representative of the steamship "Ansaldo" give to the shippers a receipt other than the bill of lading for the said 845 barrels stating that the same were in apparent good external condition?

Answer: I do not know.

(b) If so, attach to your answer to these interrogatories true copies of the same.

Answer: I have none.

Sixty-first Cross-interrogatory:

(a) Did you keep a record of the condition of the said [fol. 129] 845 barrels and/or the condition of their contents and/or the condition of the brine at the time the same were packed and/or inspected?

Answer: I kept no record.

(b) Attach copies of the same hereto and appropriately mark them for identification.

Answer: I have none.

Sixty-second Cross-interrogatory:

(a) With whom have you discussed the matters about which you have been testifying prior to the giving of your testimony?

Answer: I discussed this matter with the Rheinstrom Brothers when I returned to Cincinnati in October, 1920, and a year or so later occasionally with Mr. Kiefer.

(b) When did you discuss this matter last with Mr. August Kiefer?

Answer: I last discussed this matter with Mr. August Kiefer when I met him in Rome in the evening of April 14th, 1929.

Sixty-third Cross-interrogatory: Give the names of all persons who have been present in the room during the taking of all or a part of your testimony.

Answer: No one but Wm. Oscar Jones, Consul of the United States of America at Rome, Italy.

Sixty-fourth Cross-interrogatory:

(a) Have you ever seen or had read to you these cross-interrogatories or a translation thereof prior to giving your testimony.

Answer: No.

[fol. 130] (b) If so, state when and where you saw them and/or had them read to you.

Answer: I never saw them or had them read to me.

(c) By whom they were shown or read to you?

Answer: By no one.

(d) Had you been informed by any one as to the nature of these cross-interrogatories?

Answer: No.

Sixty-fifth Cross-interrogatory:

(a) Have you ever seen or had read to you the interrogatories or a translation thereof prior to giving your testimony?

Answer: Yes.

(b) If so, state when and where you saw them and/or had them read to you.

Answer: I received a copy of the interrogatories from Mr. Kiefer by mail on March 2nd, 1929.

(c) By whom they were shown or read to you?

Answer: They were sent to me by Mr. Kiefer from Germany, so I saw and read them myself.

(d) Had you been informed by any one as to the nature of the interrogatories?

Answer: Yes, since I read the copy which I received from Mr. Kiefer I was naturally fully informed as to the nature of the interrogatories.

Bigham, Englar, Jones & Houston, Proctors for Libellant.

[fol. 131] LIBELLANT'S EXHIBIT 2

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

THE RHEINSTROM BROTHERS COMPANY, Libellant,

against

S. S. "ANSALDO SAN GIORGIO I," SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant

Be it remembered that on Wednesday, November 12th, 1930, pursuant to Notice of Taking Deposition De Bene Esse, a copy of which is hereto annexed, at the offices of Messrs. McCutchen, Olney, Mannon & Greene, Balfour Building, in the City and County of San Francisco, State

of California, personally appeared before me, Frank L. Owen, a Notary Public in and for the City and County of San Francisco, State of California, duly appointed and authorized by law to administer oaths and affirmations, etc.

RUDOLPH G. JOHNSON, a witness called on behalf of libellant.

Messrs. McCutchen, Olney, Mannon & Greene, by Charles E. Finney, Esquire, on behalf of Messrs. Bigham, Englar, Jones & Houston, appeared as proctors for libellant; William Denman, Esquire, by Lyman Henry, Esquire, on behalf of Messrs. Loomis & Ruebush, appeared as proctors for claimant; and the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole [fol. 132] truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of the above-named witness, set to be taken on October 24, 1930, the date mentioned in the annexed copy of notice, may be taken de bene esse on behalf of the libellant, at the offices of Messrs. McCutchen, Olney, Mannon & Greene, in their deposition room, Balfour Building, in the City and County of San Francisco, State of California, on Wednesday, November 12, 1930, before said Frank L. Owen, a Notary Public in and for said City and County of San Francisco, State of California, and in shorthand by Harold H. Hart.

RUDOLPH G. JOHNSON, produced as a witness on behalf of the libellant, having been duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

By Mr. Finney:

Q. What is your full name?
A. Rudolph G. Johnson.
Q. What is your business, Mr. Johnson?
A. Cargo surveyor and appraiser.
Q. With what firm are you active?
A. Koehler, Kemp & Koehler.

Mr. Henry: Mr. Finney, will we have the usual admiralty stipulation with regard to objections, for reserving the [fol. 133] ordinary objections, and waiving now the objections regarding the form of the questions?

Mr. Finney: Yes.

Q. How long have you been associated with Koehler, Kemp & Koehler?

A. Seventeen years.

Q. In your business, and in your connection with Messrs. Koehler, Kemp & Koehler, what is the general nature of the work that you do?

A. Surveying and appraising damaged cargoes mostly; on occasions, we are called in on matters that might come up in connection with stowage and one thing and another.

Q. Have you had experience in the examination of barreled cargo; that is, cargo commodities shipped in liquids, in barrels?

A. Yes, considerable.

Q. You have had experience in making surveys and examinations of various commodities shipped in liquids in barrels, have you?

A. Yes, sir.

Q. And have you had such experience with different kinds of barrels containing liquids?

A. Yes.

Q. Does this experience also include estimating the extent of damage or depreciation to commodities shipped in liquids in barrels?

A. Yes, it does.

Q. Can you give us any idea of how many cargoes of various commodities shipped in liquids in barrels you have examined and estimated the damages on?

A. Well, that would be pretty hard to say. I would say on an average of from five to ten a month.

Mr. Henry: Are you speaking now with regard to his experience as of the date of the examination which was made, or subsequently?

[fol. 134] By Mr. Finney:

Q. I understand your experience as of to date is seventeen years?

A. Yes, sir.

Q. At the time of this examination, it would have been about seven or eight years?

A. Seven, yes, sir.

By Mr. Henry:

Q. The same answer would have been given with regard to the familiarity with barreled damage on the date of the injury in question?

A. Yes, about the same proportion. It is pretty hard to give a definite answer on that. Some seasons you have more of a certain commodity than others; but on the average I would say the answer is fairly correct.

By Mr. Finney:

Q. And had you had that experience of seven or eight years at the time you made the examination of the cargo that is involved in this case?

A. Yes, sir.

Q. And at that time, in 1920, would the number of cargoes or commodities shipped in liquids in barrels that you had examined and estimated the damage or depreciation on, run into the hundreds or thousands, or what?

A. It would go pretty close to a thousand, I should say.

Q. Have you been associated with Koehler, Kemp & Koehler all the time since you have been in this business?

A. Yes, sir, I have.

Q. So you had been with them about seven years at the time of this examination or survey?

A. Yes, sir.

[fol. 135] Q. At the time that you made the examination or survey involved in this action, you were located in New York?

A. Yes, sir.

Q. And had been during all your experience up until that time?

A. Except when I was on out-of-town cases.

Q. Your headquarters at all times were in New York, were they?

A. Yes, sir.

Q. What is your capacity with Messrs. Koehler, Kemp & Koehler at the present time?

A. Manager of their local office here.

Q. You have moved out here and taken that position somewhat recently, have you not?

A. Yes, sir.

Q. Does the firm of Koehler, Kemp & Koehler, and did they in 1920, when this examination was made, do a considerable amount of the particular type of survey that was involved in this case?

A. Yes. As a matter of fact, they examined, I dare say, the most of the damaged cherries that came into the Port of New York.

Q. And had you, during the time that you were associated with them, conducted or participated in those examinations?

A. A great number of them, yes, sir.

Q. You testified at the trial of this action on the merits in the United States District Court for the Southern District of New York, in October, 1927, did you not?

A. Yes, sir.

Q. Your name is contained in the transcript of that trial as Rudolph P. Johnson; and I note that you have here stated that your name is Rudolph G. Johnson. I presume that Rudolph G. Johnson is correct, and that the initial "P" is erroneously printed in the transcript; is that correct?

A. That is correct.

[fol. 136] Q. Did you examine the cargo discharged at New York and Philadelphia from the steamship "Ansaldo San Giorgio I," in the latter part of August, 1920, in New York, and in September, 1920, in Philadelphia?

A. Yes, sir.

By Mr. Henry:

Q. Just a moment. The cargo? Do you want to make that more explicit? Did you examine all the cargo on the boat?

A. No. Shall I answer?

By Mr. Finney:

Q. Yes, that is all right. Go ahead.

A. No, I examined mainly the damage sustained by these particular shipments of cherries.

By Mr. Henry:

Q. Were you employed to examine any other cargo other than that for the consignors here?

A. I don't recollect definitely on that. I might have had occasion to examine other shipments.

Q. But you don't remember whether——

A. I personally didn't have any other shipment than that.

Q. That is what I mean.

A. Yes.

By Mr. Finney:

Q. You made an examination or survey of some of the cargo on the "Ansaldo San Giorgio I," at those times and places at the request of whom, Mr. Johnson?

A. The Ætna Insurance Company of Hartford.

Q. They were the underwriters?

A. Yes, sir.

[fol. 137] Q. And what particular cargo from this ship did you examine?

A. What particular cargo?

Q. What was the commodity?

A. Cherries in brine consigned to Rheinstrom Brothers Company.

Q. For what purpose did you make your examination or survey?

A. For the purpose of determining the cause and extent of damage sustained.

Q. Where was the cargo when you made your examination of it in New York?

A. The shipment of 845 barrels destined to New York and discharged was on the farm at the foot or in front of Pier 25, North River.

Mr. Henry: At this time, I think it should be shown that Mr. Johnson is now reading from his notes to refresh his memory, as to the answers that he is giving. Is that correct?

Mr. Finney: Yes, he does as to some answers. He did as to the last.

Mr. Henry: Yes.

Mr. Finney: As to the location of the cherries.

The Witness: Also the quantity.

By Mr. Finney:

Q. Yes. Was any of this shipment of cherries in these barrels still on the ship, or were they all on the farm?

A. No, they had all been discharged from the steamer. Some of them were on the Old Dominion Steamship Company's Lighter "No. 50"; but the most of them were on the farm.

Q. In what sort of containers was this shipment of cherries; that is, was it in barrels or some other container?

A. In wood barrels.

Q. Did you examine these barrels and the contents of the [fol. 138] barrels which had been taken from the ship, and were on the farm, and those that were on the lighter, too?

A. Yes, sir.

Q. This shipment that you examined in New York, consisting of 845 barrels, what was the size of those barrels?

A. They contained 132 kilos of cherries.

Q. That is, net?

A. Net weight.

Q. Could you state the time when you made this examination of the shipment at New York; that is, the date?

A. August 28th, 1920, and August 27th, too.

Q. Will you please describe generally what condition you found with respect to the barrels and their contents upon your examination of this shipment in New York?

A. Many of the barrels were more or less seriously crushed at the bilges and quarter bilges; and a further quantity showed indications of leakage to a more or less extent at the chimes and/or head-stave seams, or at the point where the staves or head were broken. As a result of these conditions, the brine had leaked out of the containers, and the fruit in a number of instances was badly rotted, and in some instances worthless.

Q. You went on the ship on one or more occasions, did you?

A. I went on the ship the first examination. The steamer was there still discharging cargo.

Q. And what condition did you find there on the ship with respect to the damaged barrels or fruit from the damaged barrels?

A. Why, I observed conditions in the No. 4 hold, where we found barrels of cherries of another shipment which

were being discharged. There we did not note any quoins underneath the lower tier of barrels.

[fol. 139] By Mr. Henry:

Q. Just a minute. Is Mr. Johnson testifying regarding the cargo in question now, or to another cargo which he saw on the vessel?

A. Other cargo.

Mr. Henry: I object to the testimony in that regard, because it is irrelevant as to the matter in issue here.

The Witness: All right.

Mr. Henry: At least Mr. Johnson should confine his testimony to the particular cargo in question if for no other reason than to save time. It is immaterlai what damage or lack of damage was observed with regard to other cargoes.

By Mr. Finney:

Q. Do you know what the condition of the ship generally was in those holds where this particular cargo had been taken out?

A. I can tell you what I observed there at the time.

Q. Yes.

A. This particular shipment that I refer to, 845 barrels, that was said to be stowed in No. 1 and 3 holds of the vessel. Discharge therefrom had been completed; and we noted an accumulation of brine on the ceiling and a large quantity of loose cherries on the floor of both compartments, together with a quantity of broken staves and iron hoops from barrels, which had become broken. We noted particularly also that both of these compartments had no tween decks.

Q. But you did make an examination of these barrels and cherries of this 845 barrel shipment to determine, among other things, the nature and extent of the damage or de-

[fol. 140] preciation to them, is that correct?

A. Yes. The damaged barrels were segregated by the consignee's representative, who was there from Cincinnati; and when that work had been completed, we examined every barrel on which there was any question of damage to contents.

Q. In your testimony at the trial of this case on the merits, I believe you stated that you made a detailed report

with respect to the extent of the damage and the then condition of the barrels and casks, and their contents?

A. Yes, sir, I did.

Q. And upon your examination, did you make estimates of the depreciation to these barrels and cherries?

A. Yes. We examined each barrel. The bungs were removed, and we had a long trier, or a sampler, that is customarily used for this commodity. It consists of a handle with a sort of a three-wired arrangement, going down, which the cherries stick in when you pull it up; and that rod or sampler is inserted in the bung right down to the bottom, and then the cherries are picked up, and they are put out in a pan, and those cherries are examined carefully to determine the proportion of those cherries that are damaged, and to what extent the damaged cherries can be used. The damaged cherries, or a soft cherry can quite often be used for broken pieces, or something of the sort, instead of a whole cherry; and the damage is based upon that careful examination, and by agreement between the surveyor and the consignee's representative.

Q. There was a consignee's representative there at this time?

A. Oh, yes.

Q. Dealing now with the shipment of 845 barrels examined at New York, would you state what you found as to the extent of the depreciation of the various barrels of [fol. 141] cherries examined by you there, giving the number of barrels and percentage of depreciation?

Mr. Henry: I think that question is ambiguous, in that it might be taken to refer to the depreciation of the containers, not merely the contents. I do not know whether you intend to cover both; but I think they should be separated, anyway.

By Mr. Finney:

Q. Have you the number of barrels and the percentage of depreciation of the contents; and can you give us that?

A. Yes, sir. After detailed examination, as I indicated before, we compiled what might be termed a resume.

Mr. Henry: Just a minute, Mr. Johnson. You just said, "we compiled." I understood that you were——

The Witness: I am speaking——

Mr. Finney: You were acting for the firm.
The Witness: For the firm.

By Mr. Henry:

Q. Then these notes that you are referring to are merely your own notes?
A. No, they belong to the firm.
Q. You understand what I mean: They were made by you, but you are refreshing your memory from something that was compiled in conjunction——
A. In fact, this is a record I prepared myself.
[fol. 142] Q. Yes, but you said "we compiled a report."
A. That is a habit I have gotten into, speaking for the firm.
Q. I thought that there might have been some one else with you?
A. No. When we dictate a letter, it is always "we"; that is a habit that I have gotten into.
Q. That is a pretty good habit.
A. I will eliminate any sound barrels. You don't want me to repeat those. No purpose of putting that in.

Mr. Finney: No. Just those that were damaged.
The Witness: This is from the New York shipment. There were eleven barrels that had the cherries damaged to the extent of 10%.
Mr. Henry: Now, then— Well, I will take that up on cross examination.
The Witness: On which we agreed with the consignee to a measure of damage of 10%.
Mr. Finney: Yes. Go right ahead.

By Mr. Henry:

Q. These percentages that you are giving us, Mr. Johnson, are percentages of agreement with the consignee, or are they the estimate of yours, your actual estimate of the damage?
A. They are both.
Q. In every case would you agree?
A. We wouldn't have agreed if the figure finally determined wasn't in accordance with our views.

By Mr. Finney:

Q. These estimates of depreciation that you are giving are estimates of depreciation based upon your own ex-

[fol. 143] amination in view of your experience in examining this type of cargo, is that true?

A. Yes, sir.

Q. Will you just continue and give the numbers and percentages?

A. Nine barrels with contents damaged to the extent of 15%; twenty barrels with contents damaged to the extent of 25%; thirteen barrels with contents damaged to the extent of 40%; twelve barrels with contents damaged to the extent of 50%; twenty-nine barrels with contents damaged to the extent of 60%; thirty-one barrels with contents damaged to the extent of 75%; fourteen barrels with contents damaged to the extent of 90%; sixteen barrels with contents damaged to the extent of 100%; that is all.

Q. Were there any barrels in that shipment that you designated as sound, but to which there was in fact damage done to the barrels?

A. Yes, sir. There is a total of 35 barrels included with those which we examined, which had various breakages to the containers, but which the cherries were accepted by the consignee as sound.

Q. Did you later make a similar examination with respect to the shipment of cherries in barrels from this same ship which had been discharged at Philadelphia?

A. Yes, sir, we did.

Q. Had this cargo of cherries been taken off the ship when you made your examination in Philadelphia?

A. Yes, sir, they had.

Q. Was this examination that you made in Philadelphia also an examination of cherries in brine consigned or shipped to Rheinstrom Brothers?

A. Yes, sir.

Q. What, generally, was the condition of the barrels of cherries which you found in your examination at Philadelphia, as compared with the condition that you found in [fol. 144] the other shipment at New York?

A. The condition of barrels was very similar; but there was more extensive breakage insofar as quantity of packages that were injured was concerned.

Q. That is, more extensive at Philadelphia?

A. Yes.

Q. How many shipments of these cherries did you examine at Philadelphia?

A. Five different shipments.

Q. Were those shipments divided up into two general lots?

By Mr. Henry:

Q. Now, I think I will object to that as being unnecessarily leading.

A. There were five different lots, having these marks: RBM 792 barrels. Then apparently a part of the same lot, in that it was the same mark, 40 barrels——

By Mr. Henry:

Q. Now, are you certain of that?

A. Am I certain of it? Yes, sir.

Q. You say apparently. You don't know——

A. Well, I presume it is. It has the same mark. It is quite usual to mark it that way.

Q. But you say apparently the same. Either it is or it is not, isn't that right?

A. The records would show that, I should presume. There were also the following: R. B. V. 240 barrels; R B. S., 1,883 barrels; and U. G. 21 casks, weighing 230 kilos; 230 casks weighing 182 kilos; 15 casks, weighing 147 kilos, and 200 what I would term kegs, weighing 35 kilos.

[fol. 145] By Mr. Henry:

Q. Is that designated as kegs in your notes?

A. No, it is listed here as a cask. There isn't much distinction between them.

Mr. Henry: May we have this in the record, then Mr. Finney: That the two lots that Mr. Johnson is referring to are, one the 2,955 barrel lot, and a 466 barrel and cask lot, itemized as before stated by Mr. Johnson?

Mr. Finney: Yes.

Q. Taking first this shipment of 2,955 barrels, can you tell us the sizes of these barrels?

A. They were all 130 to 132 kilos.

Q. Will you state what you found as to the extent of depreciation of the various barrels in this 2,955 barrel lot which you examined in Philadelphia, giving the number of barrels, and the percentage of depreciation or damage to the contents of the barrels?

A. There was 105 barrels which had various breakages, and the contents were accepted as sound. 51 barrels which had the contents damaged to the extent of 10%; 35 barrels, which had the contents damaged to the extent of 15%; 8 barrels, which had the contents damaged to the extent of 20%; 100 barrels, which had the contents damaged to the extent of 25%; 79 barrels, which had the contents damaged to the extent of 40%; 116 barrels, which had the contents damaged to the extent of 50%; 95 barrels, which had the contents damaged to the extent of 60%; 89 barrels, which had the contents damaged to the extent of 75%; 3 barrels, which had the contents damaged to the extent of 85%; 42 barrels, which had the contents damaged to the extent of [fol. 146] 90%; 97 barrels, which had the contents damaged to the extent of 100%. I also looked at 7 barrels of culls, which were accepted as sound.

Q. In this shipment of 2,955 barrels, relative to which you have just given the number of barrels and percentage of depreciation or damage, were any of those damaged barrels culls, or were they all the regular shipment?

A. There were seven barrels of culls, which were accepted as sound.

Q. But the number of barrels and the damage that you have stated do not in any instance refer to culls?

A. No, sir.

Q. Did you make note at the time of your examination as to the marks of barrels, such as R.B.M., R.B.V., or R.B.S., so that you could give us the particular lot to which the damaged barrels belonged, with reference to those numbers or letters?

A. Why, these marks weren't clear; and we found so many in which there were no marks, or which were smeared up with the brine, that we found it impracticable to take the marks. In other words, it would not serve any purpose.

Q. Referring now to the 466 barrel or cask lot which you examined in Philadelphia, would you state what was the estimated extent of the depreciation or damage to the contents of the various barrels, giving us at the same time the sizes of the various damaged barrels or casks, and the number of barrels, and the percentage of depreciation?

A. These will be kegs weighing 35 kilos. Three kegs with contents accepted as sound. One keg——

By Mr. Henry:

Q. Now, those are kegs accepted as sound, but possibly [fol. 147] some slight evidence of physical damage on the outside?

A. Yes, sir.

Q. There were many kegs besides those that were accepted as sound? This refers to those that there might have been some question about?

A. Yes. As I explained before, I examined the barrels set aside by the consignee as damaged.

Q. I see.

A. One keg with contents damaged to the extent of 25%; two kegs with contents damaged to the extent of 50%; one keg with contents damaged to the extent of 60%; four kegs with contents damaged to the extent of 75%; three kegs with contents damaged to the extent of 100%. Now, casks, weighing about 230 kilos: 2 casks with contents damaged to the extent of 25%; 1 cask with contents damaged to the extent of 40%; 5 casks with contents damaged to the extent of 50%; 4 casks with contents damaged to the extent of 60%; 23 casks with contents damaged to the extent of 75%; 1 cask with contents damaged to the extent of 85%; 5 casks with contents damaged to the extent of 90%. That is all of those. Now, casks weighing 182 kilos.

By Mr. Henry:

Q. Do you call these casks or kegs?

A. It would be a cask or a barrel. It wouldn't be much difference. Five casks with contents accepted as sound; 1 cask with contents damaged to the extent of 10%; 1 cask with contents damaged to the extent of 15%; 6 casks with contents damaged to the extent of 25%; 6 casks with contents damaged to the extent of 40%; 15 casks with contents damaged to the extent of 50%; 18 casks with contents damaged to the extent of 60%; 1 cask with contents damaged to the extent of 65%; 30 casks with contents damaged [fol. 148] to the extent of 75%; 1 cask with contents damaged to the extent of 85%; 12 casks with contents damaged to the extent of 90%; 4 casks with contents damaged to the extent of 100%.

By Mr. Finney:

Q. In this 466 barrel or cask lot, the invoices show that the shipment was composed of a first selection and a second

selection; the second selection bearing the mark "II". Did you at the time of your examination make a record as to which of these grades the damaged casks or barrels belonged?

A. No, I did not.

Q. You have no record of that, and couldn't state now to which grade they belonged?

A. No, sir.

Q. In your testimony here, Mr. Johnson, you have referred to some barrels of cherries or casks of cherries, as having sustained a 100% loss. Do you mean to say that in those cases there was a short delivery of the barrels, or merely that they were so badly broken that the contents deteriorated——

Mr. Henry: I think it would be better to let the witness testify.

Q. (Continuing:) —and that they were totally worthless.

Mr. Henry: I object to that as leading and suggestive. I think that the question should be framed to let the witness testify.

By Mr. Finney:

Q. In your testimony here, you referred to some of the [fol. 149] barrels of cherries as having been 100% depreciated or damaged. What do you mean by that, Mr. Johnson?

A. I mean that I examined those barrels on the pier and found the contents damaged to such an extent that that measure of damage was fair and equitable.

Mr. Henry: That is, of course, at best your conclusion.

The Witness: Well, there is not much to do with cherries when they are damaged 100%.

By Mr. Finney:

Q. Did they have a bad odor to them?

A. Pretty rotten.

Q. Rotten to the extent that they were totally worthless?

A. Yes.

Q. In the survey report that you rendered after your examination of these cherries, did you describe some of the barrels as having bilge staves broken and patched, do you remember?

A. Yes, sir, quite a number of them.

Q. At what time did you mean that the staves were patched, Mr. Johnson?

A. The patches had every indication of having been put on recently.

Mr. Henry: Now, just a minute. I think before Mr. Johnson could possibly testify on a subject like that, some foundation should be laid, or at least the facts upon which Mr. Johnson is apparently basing a very vague conclusion should be set forth.

By Mr. Finney:

Q. Were the patches that were on these staves new or old?

[fol. 150] Mr. Henry: I think that you should let the witness testify.

Mr. Finney: That is in the alternative, whether they were new or old.

A. Oh, I saw them put on to a large extent.

Mr. Henry: That is assuming, Mr. Finney, that you are competent to decide what means had been used to determine the conclusion that the witness just gave.

By Mr. Finney:

Q. Did you see the patches being put on the barrels?

A. I did. Not all of them; but a good many of them.

Q. Were there any people there working on the barrels when you were there making your examination?

A. Yes, sir, there was several coopers working on the barrels all the time.

Q. Were they patching the staves and otherwise repairing the barrels?

A. Yes, and placed them in a condition so they could be transported to Cincinnati, where they were intended for.

Q. Could you form any opinion, from looking at the barrels, whether these staves were recently put on or not; whether the patches were put on the staves?

A. Yes, you could tell by looking, whether a patch is recent or not with a reasonable degree of accuracy.

Mr. Henry: I think that is the same question, Mr. Finney.

By Mr. Finney:

Q. What would you say, from what you observed there [fol. 151] as to the barrels being repaired, and your observation of the patches on the staves, as to whether or not the patches were put on the staves after the cargo was discharged from the ship, or before?

A. After discharge from the steamer.

Mr. Henry: I think that is the same question; and the same objection, also.

Mr. Finney: As I understand it, you don't object to him testifying that he saw the coopers putting them on?

Mr. Henry: If he saw the coopers putting on the patches, why, that is a fact that he saw; and certainly he can testify to it.

Mr. Finney: And the question was, basing his last answer on having been there and seeing the barrels being patched, and also the looks of the patches and everything else that he observed, whether or not the patches were put on recently.

Mr. Henry: Yes, but he said merely that he remembered that he saw some patches being put on; and his answer to your question does not apply to all the patches, I assume; and as to that we reserve our objection.

Mr. Finney: That is all.

Cross-examination.

By Mr. Henry:

Q. Mr. Johnson, on direct examination I understood you to say that your examination of barrel damage would be close to 1,000. About how many examinations of cargo did you make a year before the time you examined the cargo in question?

A. Well, on an average of two or three a day.

Q. And what percentage of those were, on the average, [fol. 152] an examination of barrels of cherries in brine?

A. Cherries in brine?

Q. Yes. Would you say it was relatively a small percentage of the examinations that you made?

A. Yes, it would be.

Q. So it would be very doubtful whether you had made a thousand examinations of barrels in brine up to that time?

A. I didn't mean to convey that.

Q. You meant that you had up to the present time made a thousand examinations of barreled goods?

A. No. What I meant to say was up to that time I had examined, roughly speaking, say, a thousand shipments of barreled material.

Q. But that a very small percentage of that would be an examination of barrels in brine, that is correct?

A. Barrels in brine? No, there is quite a number of commodities that come in barrels in brine.

Q. Roughly speaking, up to the time of this particular cargo examination, would you say that you had examined how many shipments of cherries in brine?

A. Oh, I would say between 75 to 100 different shipments, at least.

Q. How did you determine the weight of these barrels in the New York, or the 845 shipment?

A. Why, you can tell by the size of the barrels generally; and then your knowledge of how they are usually shipped, and so on. That would come from experience.

Q. You testified, I believe, that you couldn't tell the difference between a 130 and 132 keg, and yet you can testify positively as to the weight of all the barrels in the New York shipment. Those are only approximate.

A. I haven't meant to testify as to the weight of the barrels here. I didn't weigh them.

[fol. 153] Mr. Henry: Well, I think, then, that all the testimony that Mr. Johnson has given regarding the weight of the barrels should be stricken from the record.

Mr. Finney: Oh, no.

The Witness: I can tell the difference between a 182 kilo barrel as compared with a 130 kilo barrel, where there is such a wide distinction, but there isn't any one that can tell the difference between 130 and 132.

By Mr. Henry:

Q. I am just trying to find out regarding that. The weight, as you testified positively, in regard to the shipments, and particularly with regard to the New York shipments, is in the record. So you would say that that was an estimate, rather than a positive statement?

A. The weight in all instances was an estimate. I didn't weigh the barrels.

By Mr. Finney:

Q. Would you say it was a very accurate or a very loose estimate?

A. No, a rough estimate. I couldn't tell you whether it was 130 pounds, or 140 pounds, by looking at it, nor can any one else. Quite frequently the barrels are marked with the weight.

By Mr. Henry:

Q. You testified that a large quantity of cherries was found on the floor of the hold in the New York shipment. Now, I think that you might be a little more explicit in stat- [fol. 154] ing what you meant by a large quantity there?

A. Well, normally speaking, discharging a shipment of cherries, you shouldn't have any loose ones, because it indicates——

Q. No, just answer the question. How many, approximately, would you say there were there, or have you some means of measurement as determining the contents of the barrels?

A. I couldn't say anything at all, other than that they were two or three inches deep, at least.

Q. Do you have any independent recollection, Mr. Johnson, of this outside of your notes?

A. I have not refreshed my memory on this. I am speaking from memory on this question of loose cherries.

Q. But the other facts that you testified to, you have no independent recollection after this period of time with regard to those facts?

A. In certain instances I recollect very clearly.

Q. Just state one instance in the examination where I found that you were referring to your notes that you have stated facts from an independent recollection?

A. Well, for instance, on the matter of cooperage.

Q. But all other figures you have given are estimates and based on your notes, is that right?

A. Oh, yes, that is right.

Q. As I understood you, the way you determined the extent of the damage was by pulling out a number of cherries from the barrels?

A. Yes, sir.

Q. And you feel that that is a satisfactory means of determining the damage to the entire contents of that barrel, if you find a certain part of the few that you take out to be damaged, is that the basis of your testimony?

A. Well, a more satisfactory way to determine it would be to open the heads and remove the cherries.

[fol. 155] Q. And you didn't do that?

A. No, there were too many damaged barrels to do that.

Q. You merely pulled out a few of the cherries and based an estimate of the damage as to the contents upon those few?

A. I wouldn't say a few.

Q. How many would you say?

A. A couple of hands full.

Q. How many cherries are there in a keg?

A. I never counted them.

Q. It would be a very small percentage of the entire contents?

A. It would, yes, sir.

Q. And then a more satisfactory means would be to examine the entire contents?

A. That isn't possible, Mr. Henry.

Q. That is your conclusion. You wouldn't say, would you, Mr. Johnson, that the Philadelphia shipment was proportionately any greater damaged than the New York shipment, would you?

A. Yes, I would.

Q. I mean, being a larger shipment, wasn't it proportionately equal to the smaller New York shipment?

A. No. I think the damage to the Philadelphia cargo was more extensive and more severe.

Q. You have no means of determining why that was so?

A. The records will show that.

Q. No, I am asking you for your opinion. You have given your opinion before as to how the damage was caused—

A. I am basing my opinion on the examination that I made.

Q. I am asking you why you feel that there was a greater damage to the Philadelphia cargo than there was to the New York cargo?

A. The cherries were more seriously damaged as a general proposition.

[fol. 156] Q. No, you don't understand my question, Mr. Johnson.

A. Maybe I don't.

Q. You have just testified that there was a greater damage to the Philadelphia cargo. I am asking you now as an expert to give the reasons upon which you base your conclusion as to why the Philadelphia cargo was more seriously damaged than the New York cargo?

A. Based on my observations.

Mr. Finney: I think he has answered that.

Mr. Henry: He has testified as to why the New York cargo and the Philadelphia cargo received a certain damage. That was on the former examination. I am now asking——

Mr. Finney: You mean at the former trial?

Mr. Henry: Yes. I am now asking him as an expert why he believes that there was a greater damage to the Philadelphia cargo than to the New York cargo.

Mr. Finney: As I understand it, he saw both cargoes.

By Mr. Henry:

Q. Exactly. I am not saying that he did not testify accurately that there was a greater damage. I am asking him now as an expert to give the reasons why he believes there was a greater damage to that cargo. He testified before, in other words——

A. Well, I think I know what you are driving at, now. The examination I made in New York was on August 27th, [fol. 157] and in Philadelphia, my first examination was made on September 14th.

Q. So it is quite likely, isn't it, Mr. Johnson, that some of this damage occurred while the goods were on the farm in Philadelphia?

A. They weren't on the farm in Philadelphia; they were on a pier.

Q. Well, on the pier. I mean outside of the vessel, because the vessel had left, as I understand it, when you arrived in Philadelphia.

A. Yes, but only a couple of days. I don't know just when the steamer finished discharging in Philadelphia.

Q. But it is quite possible and quite likely that there was damage while the cargo was on the dock? I mean, was

there no other cause for that damage other than the time it spent on the dock?

A. I would say that the increase in damage to the cherries at Philadelphia was due to the difference in time or the delay.

Q. I see.

A. Between the examination in New York and when I examined them in Philadelphia.

Q. Now, you testified that some of the barrels were broken and some of the cherries did escape loose in the hold and upon the floor of the storage compartment?

A. Yes, sir.

Q. And you have also testified that there was a shortage. Now, isn't it true that your estimate of the percentage of damage was based not only upon the deterioration in the physical remains of the cherries, but also upon the loss in quantities of cherries in some of the barrels; in other words, a shortage of cherries from the barrels?

A. Yes, in some instances there was a shortage of cherries.

Q. Can you tell at this time what portion of your esti-
[fol. 158] mated percentages in each case represented deterioration, in the sense of deterioration to physically remaining cherries, and a shortage in the sense of a complete loss of the physical quantity of cherries?

A. I would have to go through my report in detail and pick out such packages as had a part of the contents missing.

Q. Have you an estimate there of the amounts missing?

A. No, I have not.

Q. So you couldn't give an accurate percentage at this time regarding what was short?

A. Well, I can tell you of the barrels that I have allotted to a damage of 100%, those were intact, and still remained as a barrel, and didn't have any of the contents missing.

Q. When you say intact and still remained as a barrel, you mean you picked up pieces that you assigned to be a part of certain barrels, isn't that true?

A. No.

Q. And you are not testifying now to a short shipment in the sense of a delivery of a physically intact barrel?

A. Not as far as I know, although I assume—I don't know absolutely, but I assume that the consignee may have

left the barrels on the pier, which were damaged to the extent of 100%.

Q. But my question is, Mr. Johnson, that all of the numbers of barrels, and the percentages that you have given, representing barrels and percentages of loss of contents of those barrels, which barrels were physically intact, except for crushing and damage, that the barrel was entirely there or could be reconstructed, we will say?

A. That is correct.

Q. Yes. Mr. Johnson, I understood you to say that you didn't know of the grade of these particular cherries in the [fol. 159] barrels; that is true, is it not?

A. That is correct. There was no indication made to me that there were different grades.

Q. Would it not, Mr. Johnson, influence the estimate that you made of damage, if the barrels contained different grades of cherries?

A. It would all depend upon what those grades were.

Q. If one grade was inferior in quality, in that it was not as perfectly a preserved cherry, that that would have been determined in estimating the actual value, the sound value of such cherries?

A. Yes, but your sound value would be originally less, I presume.

Q. Yes; but the grade would enter into it?

A. Yes, it would, because your No. 2 cherry wouldn't be as good as the No. 1 cherry, and it wouldn't stand up as well.

Q. But you have no record of the different grades?

A. No. We estimated, as a matter of fact, that the difference in grades in this shipment was very, very little.

Q. That is your conclusion?

A. That is my conclusion, because we didn't see anything——

Q. But your report is not made on the basis of a difference in grades?

A. No, sir. We assumed it was all one grade, with the exception of the culls.

Q. Yes. I think those were all accepted as sound, so they are not really in question. Now, Mr. Johnson, I understand that some of these barrels were old containers, and had been used for the purpose of carrying other commodities. Is it not possible that some of the damage to the cherries

occurred by reason of the contamination of the former cargo or commodity carried in the barrels?

A. I don't think so. There was no question of foreign [fol. 160] odors, or anything of that sort present.

Q. Was there any oil present in any of the damaged cherries?

A. I didn't note any. I am sure I would have, if it had been present.

Q. Regarding the cherries that remained in the hold, there was no oil there?

A. I didn't get close enough to those to observe.

Q. You didn't examine the contents of the sound barrels; you just examined those that were set aside by the consignee, didn't you?

A. Well, some of those were sound, if you will recollect.

Q. But you examined only the barrels that there might be some question on?

A. Yes, sir; and which the consignee thought there was a possibility of damage to the cherries.

Q. Upon what did you determine to be the sound quality upon which you based your percentages of damages here? These are percentages of damage of sound quality cherries, is that true?

A. I presumed they were sound when they were shipped.

Q. The question is, how did you know what was considered a sound quality cherry involved in this particular group of shipments?

A. Well, based on previous experiences, more or less.

Q. But you didn't examine any barrels that were not set aside as possible——

A. Not specifically for the purpose of determining the question of sound quality.

Mr. Henry: Yes. That is all.

Redirect examination.

By Mr. Finney:

Q. Can you tell us when you went to Philadelphia, Mr. Johnson, to make your examination there?

A. September 14th, 16th, and 22nd.

[fol. 161] By Mr. Henry:

Q. Just a moment. Mr. Johnson, I see that you are referring to two groups of notes there. You just referred to some notes on a small pocket pad or paper?

A. Yes, sir.

Q. Now, when were the notes made up on the paper that you used throughout the rest of the examination, and said notes being typewritten and on a regular size sheet of paper—when were those made up?

Mr. Finney: That is, during some part of the examination.

By Mr. Henry:

Q. I don't believe, Mr. Johnson, that you referred in this examination by me to these pencil notes; reference throughout was to the typewritten notes, isn't that true?

A. Yes. The report, of course, is a resume of these rough notes.

Q. When were they made?

A. The report? It was under way quite a time just prior to the—through the first part of October. The report was submitted to the underwriters on October 23rd.

Q. So the report was made at least a month after your examination, that is true, isn't it?

A. Yes.

Q. And it is that report that you used in the other part of your examination, with the exception of this last statement?

A. Yes, sir.

By Mr. Finney:

Q. And that report is a resume of those notes that you made there on the ground at the time?

A. Yes, sir. This is a compilation.

[fol. 162] Q. You did examine there some sound barrels of cherries among those that were set aside, didn't you?

A. Yes, sir.

Q. So that you do know from that what the sound cherries in this particular shipment were like, do you?

A. What they should be like, do you mean?

Q. No, what the sound cherries in those barrels that were accepted as sound cherries, you know what those cherries were like?

A. Yes, sir.

Q. You saw them and examined them?

A. Yes, sir.

Q. And also I presume that from your general experience in this business, you know what sound cherries are like?

A. Yes, sir.

Q. When you examined these barrels of cherries, as I understand you, you pulled out some of the cherries from each barrel?

A. Yes, sir.

Q. And would you take those all from one place in the barrel, or various depths and places in the barrel?

A. We drove it down to the bottom of the cask in order to get some on the way up, and tried to get samples from the center, and paid particular attention in avoiding getting cherries next to the bung.

Mr. Finney: That is all.

Recross-examination.

By Mr. Henry:

Q. But that would be within the same area of the barrel, the same horizontal area?

A. In the center of the barrel?

Q. Yes.

A. Yes.

Mr. Henry: That is all.

[fol. 163] Redirect examination.

By Mr. Finney:

Q. You poked this trier clear to the bottom of the barrel, and then pulled it up, is that the way you did?

A. Yes, sir.

Q. Is that the usual method of examining cherries in barrels?

A. Yes, sir.

Q. Is that an accurate one, as far as you know, from your experience?

A. Reasonably accurate, yes.

Q. In determining the extent of damage or depreciation of the entire barrel?

A. Yes. I can mention here that it is a custom that is followed largely in an examination of damaged barrels of cherries, not only by surveyors but by importers.

By Mr. Henry:

Q. Mr. Johnson, it is chiefly used because it is expeditious?

A. Expeditious and economical.

By Mr. Finney:

Q. And has been found fairly accurate.

By Mr. Henry:

Q. Mr. Johnson, I don't believe you stated in any great detail just what caused these percentages of damage, outside of your statement that you couldn't state what percentage represented a shortage of cherries in contrast with a shortage of the barrel. You will admit that?

A. I mentioned before that I could determine from my records the number of barrels which were intact, and that the contents were worthless, in which there was no loss of cherries.

[fol. 164] Q. This is what I mean: Just what, from a chemical standpoint, caused the damage?

A. The damage was caused by a loss of the brine. They break down completely as soon as the brine is gone.

Q. So that it was the loss of brine that caused the damage?

A. Yes, sir.

Q. And that resulted in——

A. In fermentation.

Q. In fermentation?

A. And rotting of the contents. They started getting soft, and then they start to shrivel, and go on through various stages.

Q. So if the cherries were of a different grade and not as solid, they would apparently have suffered a greater damage, that is true, isn't it?

A. To an extent, yes; but if you start with a lower grade, you start off with a lower value.

Q. Yes, but——

A. And I do not think there would be any difference in that.

Mr. Finney: That is, he didn't go into the different grades?

Mr. Henry: Yes, that is his testimony.

The Witness: I didn't know there were two different grades, frankly.

Mr. Finney: Except that he just differentiated the culls.

Mr. Henry: Oh, yes, there is no question about that. That is all.

Mr. Finney: That is all.

Rudolph G. Johnson.

[fol. 165] UNITED STATES OF AMERICA,
State and Northern District of California,
City and County of San Francisco—ss.:

I certify that, pursuant to Notice of Taking Deposition De Bene Esse, a copy of which is hereto annexed, on Wednesday, November 12, 1930, before me, Frank L. Owen, a Notary Public in and for the City and County of San Francisco, State of California, at the offices of Messrs. McCutchen, Olney, Mannon & Greene, in their deposition room, Balfour Building, in the City and County of San Francisco, State of California, personally appeared Rudolph G. Johnson, a witness called on behalf of the Libellant in the cause entitled in the caption thereof; and Messrs. McCutchen, Olney, Mannon & Greene, by Charles E. Finney, Esquire, on behalf of Messrs. Bigham, Englar, Jones & Houston, appeared as proctors for the Libellant; William Denman, Esquire, by Lyman Henry, Esquire, on behalf of Messrs. Loomis & Ruebush, appeared as proctors for the Claimant; and the said witness, being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

I further certify that the deposition was then and there taken down in shorthand notes by Harold H. Hart, a competent and disinterested official shorthand reporter, and thereafter reduced to typewriting by him under my personal supervision, and was after it had been so reduced to typewriting subscribed by the witness, and the same has

been retained by me for the purpose of sealing up and directing the same to the Clerk of the Court, as required by law.

[fol. 166] And I do further certify that the witness lives in the State of California, more than one hundred miles from the place where this cause is to be tried.

And I do further certify that I am not of counsel, nor attorney for either of the parties in said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In witness whereof, I have hereunto set my hand in my office aforesaid, this 22nd day of November, one thousand nine hundred and thirty.

Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of California.
(Notarial Seal.)

[fol. 167] LIBELLANT'S EXHIBIT 4

Ent. 879

Invoice

(Place and date:) Modena, 15 Luglio, 1920.

Invoice of 466 barili ciliegie solforate in salamoia purchased by The Rheinstrom Brothers & Co., of Cincinnati, Ohio, from Ghisetti Antonio & Co., of Modena, to be shipped per s/s "Ansaldo San Giorgio I" per Filadelfia.

Marks, numbers, and quantities	Full description of goods	Price per unit	Total amount
U. G.	379 barili lordo Kg. 85310 netto Kg. 51674 ciliegie solforate in salamoia per 100 Kg.	$16.25	
	Totale		$8,394.03
U. G. II	87 barili lordo Kg. 7140 netto 4221 idem idem per 100 Kg.	$9.20	
			$388.33
	Totale		$8,782.36

merce resa franca bordo Genova

Spese non incluse

Porto ferrovia	Lit.	3760.=
Nolo	"	16448.=
Vidimazione consolare	"	50.=
Totale	Lit.	20258.=

Ordinazione ricevuta il 8 Luglio, 1920.
Contratto di vendita stabilito in valuta degli S. U. A.

[fol. 168] N. B.—Always state the cost of packing, and all other costs, charges, and expenses.

The above invoice is correct and true.

(Signature of purchaser or seller) p. Antonio Ghisetti & Co., Antonio Ghisetti (Comproprietario).

[Stamp:] Invoice presented Mar. 1, 1921

Entry 879

Invoice of Food Products

Duplicate

Purchased by Importer

Invoice No. 1312 issued in Triplicate.
Certified Jul. 20, 1920.

American Consular Service

at Florence, Italy

Date: July 15th/1920.
Seller: Ghisetti Antonio & Co., Modena.
Purchaser: The Rheinstrom Brothers & Co., Cincinnati, Ohio.
Name of vessel or railroad: S/S Ansaldo San Giorgia I.
Port of shipment: Genova.
Port of arrival: } Philadelphia (Penn.)
Port of entry: }

Amount of invoice: $8782.36.
Kind of goods: ciliegie solforate in salamoia.

[fol. 169] Form No. 138

Declaration of Purchaser or Seller or Duly Authorized Agent of Either

I, Ghisetti Antonio & Co., of Modena, do solemnly and truly declare that I am the Seller of the merchandise in the within invoice mentioned and described; that the said invoice is in all respects correct and true, and was made at the place named therein whence the said merchandise is to be exported to the United States of America; that said invoice contains a true and full statement of the time when, the place where, and the person from whom the same was purchased, or agreed to be purchased, and the actual cost thereof, price actually paid or to be paid therefor; and all charges thereon; that no discounts or commissions are contained in said invoice but such as have been actually allowed thereon; that all drawbacks or bounties received or to be received are shown therein; that no different invoice of the merchandise has been or will be furnished to anyone, and that the currency in which the invoice is made out is that which was actually paid or to be paid for the said merchandise.

I further declare that it is intended to make entry of said merchandise at the port of Philadelphia (Penn.) in the United States of America.

Dated at Modena July 17th, this — day of ——, 1920.

p. Antonio Ghisetti & Co., Antonio Ghisetti (comproprietario).

[fol. 170] Form No. 140

Consular Certificate

(Date:) Jul. 20, 1920.

I do hereby certify that the invoice described in the indorsement hereof was this day produced to me by the signer of the annexed declaration.

I do further certify that I am satisfied that the person making the declaration hereto annexed is the person he represents himself to be, and that the prices given in the invoice agree with the actual market value or wholesale price

of the merchandise described in the said invoice in the principal markets of the country at the time of exportation, excepting as noted by me upon said invoice, or respecting which I shall make special communication to the proper authorities.

I further certify that a fee of $2.50 United States gold, equal to 5000, has been paid by affixing stamps to the duplicate copy of this document.
(Local currency)

Witness my hand and seal of office the day and year aforesaid.

W. Roderick Dorsey, Consul of the United States of America.

(Consular Service Fee Stamp.)

[fol. 171] Ent. 880

Invoice

(Place and date:) Savona, Italy, July the 19th, 1920.

Invoice of Cherries in brine purchased by The Reinstrom Brothers Co., of Cincinnati, Ohio, from Societa Esportazione Agr. Ligure, of Savona, Italy, to be shipped per it. s/s "Ansaldo S. Giorgio 10" sailed on the 19th July, 1920.

Marks, numbers, and quantities	Full description of goods	Price per unit $	Total amount $
R B Cincinnati	Cherries in brine = Nett weight Kilos 393.015 & $16.50 % Ks....	0.16550	64847.50
2955	(Price quoted f. o. b. Genoa.)		
Barrels	Freight		6000.00
	Insurance		320.=
	Consular Invoice.....		2.50
	Total amount..... cif New York		71170.=

Purchased on the 25 of June of 1920.=

[Stamp:] Consignee Notified Sep. 9, 1920.

N. B.—Always state the cost of packing, and all other costs, charges, and expenses.

The above invoice is correct and true. (Signature of purchaser or seller:) Soc. Esp. Agricola Ligure by (Signature illegible).

[fol. 172] Custom House Indorsement*

Marks, Quantity, and Contents
R. B. 2955 barrels
Cincinnati
Cherries in brine
gross weight Kilos
679.650.=

Ent. 880

Duplicate

Invoice of Food Products

Purchased by Importer

Invoice No. 526 issued in Triplicate.
Certified Jul. 20, 1920.

American Consular Service at Genoa

Date: 19th July, 1920.
Seller: Soc. Esportazione Agricola Ligure, Savona, Italy.
Purchaser: The Reinstrom Brothers Co., Cincinnati.
Name of vessel or railroad: Ansaldo San Giorgio I.
Port of shipment: Genoa.
Port of arrival: Philadelphia.
Port of entry: Philadelphia.
[fol. 173] Amount of invoice $71,170.=
Kind of goods, Cherries in brine.

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* Consular officers will leave all of the above indorsement blank. It is to be filled in only at the custom-house at the port of entry.

Form No. 138

Declaration of Purchaser or Seller or Duly Authorized Agent of Either

I, Soc. Esp. Agricola Ligure of Savona, Italy, do solemnly and truly declare that I am the (Purchaser or seller) seller of the merchandise in the within invoice mentioned and described; that the said invoice is in all respects correct and true, and was made at the place named therein whence the said merchandise is to be exported to the United States of America; that said invoice contains a true and full statement of the time when, the place where, and the person from whom the same was purchased, or agreed to be purchased, and the actual cost thereof, price actually paid or to be paid therefor; and all charges thereon; that no discounts or commissions are contained in said invoice but such as have been actually allowed thereon; that all drawbacks or bounties received or to be received are shown therein; that no different invoice of the merchandise has been or will be furnished to anyone, and that the currency in which the invoice is made out is that which was actually paid or to be paid for the said merchandise.

I further declare that it is intended to make entry of said merchandise at the port of Philadelphia in the United States of America.

Dated at Genoa, this 19th day of July of 1920.

Soc. Esp. Agricola Ligure, by (Signature illegible.)

[fol. 174] Form No. 140

Consular Certificate

(Date:) Jul. 20, 1920.

I do hereby certify that the invoice described in the indorsement hereof was this day produced to me by the signer of the annexed declaration.

I do further certify that I am satisfied that the person making the declaration hereto annexed is the person he represents himself to be, and that the prices given in the invoice agree with the actual market value or wholesale price of the merchandise described in the said invoice in

the principal markets of the country at the time of exportation, excepting as noted by me upon said invoice, or respecting which I shall make special communication to the proper authorities.

I further certify that a fee of $2.50 United States gold, equal to (Local currency) 50 lira, has been paid by affixing stamps to the duplicate copy of this document.

Witness my hand and seal of office the day and year aforesaid.

A. Boraguco, Vice Consul of the United States of America.

(Place and date:) Naples, this 27th day of July, 1920.

Invoice of Cherries in Brine purchased by Rheinstrom Bros. of New York (Cincinnati) from Societa Esportazione [fol. 175] Agricola Ligure, of Savona, to be shipped per New York S/S "Ansaldo S. Giorgio I°."

Marks, numbers, and quantities	Full description of goods	Price per unit	Total amount
R. B. Cincinnati B.	Eight hundred and forty-five barrels cherries in brine nett KG. 114075 a ..... (F. O. B. Naples)	0.16.5	18822 37

The above invoice is correct and true.

(Signature of purchaser or seller) Societa Esportazione Agricola Ligure, Savona. (Signature illegible.)

Custom House Indorsement

No. 10734

Importer: Rheinstrom Bros. Co.
Vessel: S/S Ansaldo S Giorgio.
Arrived: Aug. 23/20.
Kind of Entry: Free.

Marks, Quantity, and Contents	
R. B. Cincinnati B.	Eight hundred and forty five barrels cherries in brine brutt Kilos 202800

P. H. Petry Co.

[fol. 176] Consular officers will leave all of above indorsement blank. It is to be filled in only at the custom-house at the port of entry.

Purchased by Importer

Invoice of Food and Drug Products

Invoice No. 1503 issued in {Triplicate. / Quadruplicate.}

Certified 26 Lug. 1920.

American Consular Service

at Naples

Date: 26th day of July, 1920.
Seller: Società Esportazione Agricola Ligure.
Purchaser: Rheinstrom Bros.
Name of vessel or railroad: "Ansaldo S. Giorgio I°."
Port of shipment: Naples.
Port of arrival: New York.
Port of entry: New York.
Amount of invoice: $18822.37.
Kind of goods; Cherries in Brine.

Form No. 138

Declaration of Purchaser or Seller or Duly Authorized Agent of Either

I, Società Esportazione Agricola of Ligure Savona do solemnly and truly declare that I am the (Purchaser or [fol. 177] seller) seller of the merchandise in the within invoice mentioned and described; that the said invoice is in all respects correct and true, and was made at the place named therein whence the said merchandise is to be exported to the United States of America; that said invoice contains a true and full statement of the time when, the place where, and the person from whom the same was purchased, or agreed to be purchased, and the actual cost thereof, price actually paid or to be paid therefor; and all charges thereon; that no discounts or commissions are contained in said invoice but such as have been actually allowed thereon; that all drawbacks or bounties received or

to be received are shown therein; that no different invoice of the merchandise has been or will be furnished to anyone, and that the currency in which the invoice is made out is that which was actually paid or to be paid for the said merchandise.

I further declare that it is intended to make entry of said merchandise at the port of New York in the United States of America.

Dated at Naples, this 26th day of July, 1920.

Societa Esportazione Agricola Ligure, Savona
(Signature illegible).

[fol. 178] Form No. 140

Consular Certificate

(Date:) 26 Lug. 1920.

I do hereby certify that the invoice described in the indorsement hereof was this day produced to me by the signer of the annexed declaration.

I do further certify that I am satisfied that the person making the declaration hereto annexed is the person he represents himself to be, and that the prices given in the invoice agree with the actual market value or wholesale price of the merchandise described in the said invoice in the principal markets of the country at the time of exportation, excepting as noted by me upon said invoice, or respecting which I shall make special communication to the proper authorities.

I further certify that a fee of $2.50 United States gold, equal to 50 has been paid by affixing stamps to the dupli-

(Local currency.)

cate copy of this document.

Witness my hand and seal of office the day and year aforesaid.

(Signature illegible), Consul of the United States of America.

(American Consular Service Fee Stamp.)

[fol. 179] LIBELLANT'S EXHIBIT 4A

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

RHEINSTROM BROTHERS COMPANY, Libellant,

against

S. S. "ANSALDO SAN GIORGI I," SOCIETA NATIONALE DI NAVIGAZIONE, Claimant

It is hereby stipulated by and between the proctors for the respective parties hereto that the documents attached hereto are true copies of letters exchanged between counsel in this case on the dates indicated.

Dated New York, March 25, 1931.

Bigham, Englar, Jones & Houston, Proctors for Libellant. Loomis & Ruebush, Proctors for Claimant.

[fol. 180] Exhibit 1, Annexed to Libellant's Exhibit 4A

18 April, 1921.

S. S. "Ansaldo San Giorgio I."
Our File No. 01931.

Messrs. Loomis, Barrett & Jones, 52 Broadway, New York City.

Attention of Mr. Loomis

DEAR SIRS:

Referring to telephone conversation had with Mr. Loughran of our office, we have a claim for $17,000 against this vessel on account of damage to three shipments of cherries in brine from Genoa and Naples, which arrived in August and September of last year. A portion of the shipment was consigned to and delivered at New York on August 19th and the remainder at Philadelphia on September 2nd. The Rheinstrom Bros. Co. of Cincinnati, Ohio, owned the goods.

As we are preparing a libel and understand that there is a possibility of your being authorized to appear and bond, we shall refrain from attaching one of the vessels

of this line if you will assure us that you will furnish the necessary bond.

Awaiting your advices, we remain

Very truly yours, —— ——.

RHL:TS.

[fol. 181] Exhibit 2, Annexed to Libellant's Exhibit 4A

Loomis, Barrett & Jones, Attorneys & Counsellors at Law, 52 Broadway, New York

Homer L. Loomis, Joseph A. Barrett, Stephen A. D. Jones.

April 21, 1921.

Re s/s Ansaldo San Giorgio I

Messrs. Harrington, Bigham & Englar.

Dear Sirs: Your letter of the 18th instant is at hand asking whether it will be necessary for you to have process of foreign attachment issued in this case in which you are now preparing a libel. We are writing to clients and hope to have advices enabling us to answer your query within the next few days.

Yours very truly, (Sgd.) Loomis, Barrett & Jones.

[fol. 182] Exhibit 3, Annexed to Libellant's Exhibit 4A

December 10, 1921.

S. S. "Ansaldo San Georgio I".
The Rheinstrom Bros. Co.
Our file No. 01931.

Messrs. Loomis & Jones, 52 Broadway, New York City.

Dear Sirs: We beg to refer you to our letter of April 18th and your reply of April 21st. Will you kindly let us hear from you in this matter, at your earliest convenience.

Yours very truly, —— ——.

AO:MAC.

[fol. 183] Exhibit 4, Annexed to Libellant's Exhibit 4A

Loomis & Jones, Attorneys at Law, 52 Broadway, New York

Homer T. Loomis, Stephen A. D. Jones, Esli L. Sutton.

December 13, 1921.

S. S. "Ansaldo San Giorgio I".

Rheinstrom Bros. Co.

Messrs. Harrington, Bigham & Englar.

DEAR SIR:: We have your letter of the 10th instant in the above matter, your file number 01931, and in response thereto beg to advise that in consideration of your refraining from attaching we will appear and furnish bond in an amount to be hereafter agreed upon or fixed by the court in the libel you are about to file against this ship.

Yours very truly, (Sgd.) Loomis & Jones.

[fol. 184] Exhibit 5, Annexed to Libellant's Exhibit 4A

May 18, 1922.

The Rheinstrom Bros. Co. v. S. S. Ansaldo San Giorgio I. Our file No 01931.

Messrs. Loomis & Jones, 52 Broadway, New York City.

DEAR SIRS: Will you kindly appear and file stipulation for value in the above action, without further delay.

Yours very truly, —— ——.

AO:MAC.

Exhibit 6, Annexed to Libellant's Exhibit 4A

November 2, 1922.

The Rheinstrom Bros. Co. v. S. S. Ansaldo San Giorgio I. Our file No 01931.

Messrs. Loomis & Jones, 52 Broadway, New York City.

DEAR SIRS: Will you kindly file your answer in the above case without further delay.

Yours very truly, —— ——.

AO:MAC.

[fol. 185] Exhibit 7, Annexed to Libellant's Exhibit 4A

Loomis & Jones, Attorneys at Law, 52 Broadway, New York

Homer L. Loomis, Stephen A. D. Jones, Esli L. Sutton, Reginald B. Williams.

November 3, 1922.

Rheinstrom Brothers v. S. S. Ansaldo San Giorgio I.

Messrs. Bigham, Englar & Jones.

Dear Sirs: Referring to your letter of the 2nd instant we desire to state that we are now in the process of preparing our answer and will serve you with a copy of the same in due course.

Yours very truly, (Sgd.) Loomis & Jones.

[fol. 186] Exhibit 8, Annexed to Libellant's Exhibit 4A

December 1, 1928.

S. S. "Ansaldo San Giorgio I".
Our file No. 01931.

Messrs. Loomis & Ruebush, 52 Broadway, New York City.

Dear Sirs: We should be glad to agree the damages in this case, if agreeable to you, to avoid further expense. Accordingly, we enclose a statement of these damages. We also enclose, for your information, a copy of Messrs. Koehler, Kemp & Koehler's survey report upon the basis of which the damages are figured. The other pertinent documents bearing on the loss, such as invoices, etc., are available to you in the record on appeal.

Yours very truly, —— ——.

K-4. Enclosures.

[fol. 187] Exhibit 9, Annexed to Libellant's Exhibit 4A

Loomis & Ruebush, Attorneys at Law, 52 Broadway, New York

Homer L. Loomis, Reginald B. Williams, Glenn W. Ruebush.

December 5, 1928.

Rheinstrom Brothers v. Ansaldo San Giorgio.

Messrs. Bigham, Englar & Jones.

Dear Sirs: We have your letter of the first instant together with its stated enclosures.

We are making a study of these documents and will discuss with you in due course the possibility of agreeing upon your provable damages.

In the meantime we remain,

Yours very truly, (Sgd.) Loomis & Ruebush.

[fol. 188] Exhibit 10, Annexed to Libellant's Exhibit 4A

January 8, 1929.

The Rheinstrom Bros. Co. v. S. S. Ansaldo San Giorgio I.
Our File No 01931.

Messrs. Loomis & Ruebush, 52 Broadway, New York City.

Dear Sirs: We beg to refer you to our letter of December 1st and your reply of December 5th, and should be glad to know if you have reached any conclusion.

Very truly yours, —— ——.

L-2.

[fol. 189] Exhibit 11, Annexed to Libellant's Exhibit 4A

Loomis & Ruebush, Attorneys at Law,

52 Broadway, New York

Homer L. Loomis, Reginald B. Williams, Glenn W. Ruebush.

January 10, 1929.

Rheinstrom Brothers Co. v. s/s Ansaldo San Giorgio I.

Messrs. Bigham, Englar & Jones.

Dear Sirs:

We have your letter of the 8th instant. We have studied the enclosures of your letter of December 1st last and note that the surveyors in making their estimates of the percentage of damage in each case used 5 percentages or multiples of 5 percentages. Accordingly, we assume that their estimates were only general estimates and were undoubtedly most favorable to the consignee.

Furthermore, in arriving at your damages you have apparently assumed that the barrels and casks in question were full of cherries and that the cherries were in good condition at the time they were delivered to the carrier. We have no way of knowing how many pounds of cherries the barrels in question contained, or ideed that they contained any cherries at all for that matter, for presumably barrels full of liquid would weigh as much as barrels full of cherries. Furthermore there seems to us to be grave doubt [fol. 190] that the cherries were in good condition at the time they were shipped. Indeed we should imagine that in many instances they were not.

However, in order to avoid any further expenses in connection with this case we should be willing to recommend to our client that it pay a reasonable amount in settlement of this case. What would you say to a settlement in the sum of $10,000 flat?

Waiting to hear from you further in the premises, we are

Yours very truly, (Sgd.) Loomis & Ruebush.

Exhibit 12, Annexed to Libellant's Exhibit 4A

January 30, 1929.

Rheinstrom Bros. Co. v. S. S. Ansaldo San Giorgio I.

(Our file No. 01931.)

Messrs. Loomis & Ruebush, 52 Broadway, New York City.

DEAR SIRS:

Referring to your letter of the 10th instant, we beg to advise you that we have submitted the question of settling for $10,000 to our clients. Our clients have declined to entertain settlement on such a basis and we are accordingly going ahead with our proof of damages. We enclose here- [fol. 191] with an order for a commission directed to the American Consul at Rome, to take the testimony of August Kiefer and Umberto Gasperini, which we shall be obliged if you will consent to.

Yours very truly, —— ——.

L-2. Enclosure.

Exhibit 13, Annexed to Libellant's Exhibit 4A

Loomis & Ruebush, Attorneys at Law,

52 Broadway, New York

Homer L. Loomis, Reginald B. Williams, Glenn W. Ruebush.

January 31, 1929.

Rheinstrom Brothers Co. v. S/S Ansaldo San Giorgio I.

Messrs. Bigham, Englar, Jones & Houston.

DEAR SIRS:

We hereby acknowledge the receipt of your letter of the 30th instant, together with its stated enclosure.

We also confirm the telephone conversation had between our Mr. Loomis and your Mr. Houston of the 30th instant.

We understand that the proposed order for the commis- [fol. 192] sion is to be held in abeyance pending further settlement negotiations.

Yours very truly, (Sgd.) Loomis & Ruebush.

Exhibit 14, Annexed to Libellant's Exhibit 4A

February 18, 1929.

The Rheinstrom Brothers Co. v. S. S. Ansaldo San Giorgio I.

(Our file No. 01931.)

Messrs. Loomis & Ruebush, 52 Broadway, New York City.

Attention of Mr. Ruebush

DEAR SIRS:

Confirming our Mr. Ogden's telephone conversation with you of this afternoon, we beg to advise you that we are obliged to insist that your cross-interrogatories addressed to August Kiefer and Umberto Gasperini be filed and served upon us on or before February 25th, as provided by the order for the commission. This letter will formally notify you that we are not prepared to grant any extensions in the matter.

Very truly yours, —— ——.

[fol. 193] Exhibit 15, Annexed to Libellant's Exhibit 4A

June 19, 1930.

Rheinstrom Bros. & Co. v. SS. Ansaldo San Giorgio I.

(Our file No. 01931.)

Messrs. Loomis & Ruebush, 165 Broadway, New York City.

DEAR SIRS:

We enclose herewith in question and answer form the interrogatories and cross-interrogatories propounded to August Kiefer and Umberto Gasperini, together with the answers of the witnesses.

Very truly yours, —— ——.

L-4. Enclosures.

[fol. 194] Exhibit 16, Annexed to Libellant's Exhibit 4A

Loomis & Ruebush, Attorneys at Law,

165 Broadway, New York

Homer L. Loomis, Reginald B. Williams, Glenn W. Ruebush.

June 21, 1930.

5370 Rheinstrom v. Ansaldo.

Messrs. Bigham, Englar, Jones & Houston.

DEAR SIRS:

We have your letter of the 19th instant together with its stated enclosure for which we thank you.

Yours very truly, (Sgd.) Loomis & Ruebush.

[fol. 195] Exhibit 17, Annexed to Libellant's Exhibit 4A

October 22, 1930.

S. S. "Ansaldo San Giorgio I."
The Rheinstrom Bros. Co.
(Our file No. 01931.)

Messrs. Loomis & Ruebush, 165 Broadway, New York City.

DEAR SIRS:

We confirm, at your request, having adjourned the examination of Mr. Johnson, of San Francisco, from October 24th to November 12th, at the same time and place.

Very truly yours, —— ——.

B-3.

[fol. 196] LIBELLANT'S EXHIBIT 5

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

82-357

THE RHEINSTROM BROTHERS CO., Libellant,

against

THE S. S. "ANSALDO SAN GIORGIO I," her engines, boilers, etc., SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant

SIRS:

Please take notice that upon the pleadings herein, the libellant will move this Court at a Stated Term for the hearing of motions to be held in the Court Rooms thereof in the Post Office Building, Borough of Manhattan, Southern District of New York, on the 6th day of October, 1931, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard for an order allowing the libellant to propound the following interrogatories to the claimant of the above-named vessel, to be answered by it in writing and under oath:

First Interrogatory: Examine the attached document marked Exhibit "A", being a photostatic copy of an original letter on the printed letterhead of the Societa Nazionale di Navigazione, the claimant, addressed to Rheinstrom [fol. 197] Bros. Co., the libellant in this case, and state whether or not the original letter was sent to the libellant by the claimant.

Second Interrogatory: Examine the attached copies of telegram and letters marked Exhibits "B", "C", "D" and "E", respectively, and state whether the originals of all or any one of said copies were received by the claimant, the Societa Nazionale di Navigazione or its representatives.

Third Interrogatory: Did the claimant receive the copy of letter from Koehler, Kemp & Koehler addressed to the

libellant which is referred to in Exhibit "C". If so, attach a copy of same to the answers hereto.

Dated, New York City, Sept. 30, 1931.

Yours, etc., Bigham, Englar, Jones & Houston, Proctors for Libellant, Office & P. O. Address, No. 64 Wall Street, New York City.

To Loomis, Williams & Donohue, Esqs., Proctors for Claimant, No. 165 Broadway, New York City.

[fol. 198] Exhibit A, Annexed to Libellant's Exhibit 5

Societa Nazionale di Navigazione, Genova

139 South Third Street,
Philadelphia, Oct. 15, 1920.

S. S. "Ansaldo San Giorgio I"

The Rheinstrom Bros. Co., Cincinnati, Ohio.

GENTLEMEN:

We are still holding on Pier 40 about one hundred and fifty (150) barrels from your consignment on the S. S. "Ansaldo San Giorgio I".

Some of these barrels are half full of decayed matter and the Board of Health has requested immediate disposal.

Unless we receive your orders relative to the disposition of these barrels, we will be compelled to have same removed for your account.

Yours very truly, Societa Nazionale di Navigazione,
Per D. Maggi, G.

FLG/EF.

Received Oct. 18, 1920.
Ans'd.
Ent'd.

[fol. 199] Exhibit B, Annexed to Libellant's Exhibit 5

F 7 Ax ra 1247p— 19
Po Phila Pa Oct 20—
Rheinstrom Bros. Co.
Cinti O.

Advise immediately disposition of barrels board of health will remove for your account and expense with twenty four hours.

Societa Nazional Nav.

Received Oct. 20, 1920.
Ans'd.
Ent'd.

[fol. 200] Exhibit C, Annexed to Libellant's Exhibit 5

Societa Nazionale di Navigazione, 80 Maiden Lane, New York City.

GENTLEMEN:

We are just in receipt of advices from our representative, Mr. Clifford W. Kramer, that the shipment of Cherries ex S/S "Ansaldo San Georgia I", has been discharged in a badly damaged condition.

We hereby notify you that we will enter claim for loss sustained by us and enclose herewith copy of letter received from Messrs. Koehler, Kemp and Koehler, surveyors and appraisers, who have been called upon to appraise the damage to this shipment.

We request that you give us an explanation of your company's negligence and if your representatives have not seen the damage to this shipment, we suggest that they do so immediately.

Very truly yours, The Rheinstrom Bros. Co.

August Thirty-first
Nineteen-Twenty.
F F'R.

[fol. 201] Exhibit D, Annexed to Libellant's Exhibit 5

Societa Nazionale di Navigatione, #80 Maiden Lane, New York City.

GENTLEMEN:

In re Cherries in Brine
Ex S/S "Ansaldo San Giorgio I".

Please take notice that our shipment of 845 casks of Cherries in Brine, ex above steamer arriving in New York about August 31st, 1920, was delivered short 45 casks, and we hereby make claim for same on the S/S "Ansaldo San Giorgia I," her owners and charterers. B/L calls for 845 casks, and you only delivered 809 casks.

As advised you under date of August 31st, there was also considerable damage to this shipment, for which we intend

to file claim, and we will advise you of the amount as soon as ascertained.

Please acknowledge receipt of this communication, and oblige,

Very truly yours, The Rheinstrom Bros. Co.

October Second,
Nineteen-Twenty.
J. E'R.

[fol. 202] Exhibit E, Annexed to Libellant's Exhibit 5

Societa Nazionale di Navazione, 139 South Third St., Philadelphia, Pa.

(Registered)

GENTLEMEN:

There is a loss to our cargo of 3421 barrels of Cherries in Brine, ex S/S "San Giorgio I," from Naples arriving Philadelphia about September 1st, and we hereby make claim for the same on the S/S "San Giorgio I," her owners and charterers.

The amount of the loss has not as yet been ascertained, but when determined, we will advise you further.

The Rheinstrom Bros. Co.

September Twenty-second,
Nineteen-Twenty.
JE—K.

P. S. The cargo consists of two (2) lots—one of 466 barrels, and one of 2,955 barrels.

[fol. 203] Answers of Claimant, Annexed to Libellant's Exhibit 5

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

82-357

RHEINSTROM BROS. COMPANY, Libellant,

against

S/S "ANSALDO SAN GIORGIO I," SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant

Answers of the claimant, Societa Nazionale di Navigazione, to the interrogatories of libellant, Rheinstrom Bros.

Company, given on information and belief and to the extent that the investigation thus far made by the claimant permits.

To the First Interrogatory: Yes.

To the Second Interrogatory: No, except as to Exhibit D which was received by the claimant.

To the Third Interrogatory: No.

Societa Nazionale di Navigazione, Claimant, by Dominie A. Truda, as Agent.

[fol. 204] STATE OF NEW YORK,
County of New York, ss:

Dominic A. Truda, being duly sworn, deposes and says that he is agent for the claimant herein; that he has read the foregoing answers and knows the contents thereof and that the same are true of his own knowledge except as therein stated to be alleged upon information and belief and that as to those matters he believes it to be true; that the reason this verification is made by deponent is that claimant is a foreign corporation, none of whose officers is within this jurisdiction and that deponent is an officer of its agent and authorized to make this verification; that the sources of deponent's information and the grounds of his belief as to all matters not stated in the said answers to be alleged upon his own knowledge are reports made to him by employees and records of said corporation.

Dominic A. Truda.

Sworn to before me this 1st day of December, 1931. P. I. Brunato, Notary Public. Kings Co. No. 299, Reg. No. 2357. Cert. filed in N. Y. Co. No. 950, Reg. No. 23646. Commission Expires March 30, 1932. (Notarial Seal.)

[fol. 205] LIBELLANT'S EXHIBIT 6

Translation furnished by Carl Geller, 9– Broad Street. Tel. Bowling Green 9-5514. For Messrs. Bigham, Englar, Jones & Houston. Vessel S/S Ansaldo San Giorgio I.

(Translation of Invoices)

Chisetti Astonio & Cia

Exportation Fresh Fruit.
Importation Dried Fruit and Vegetables.

Modena, Italy, July 5, 1920.

Invoice No. 167-177

Messrs. The Rheinstrom Brothers & Co., Cincinnati (Ohio).

For packages loaded in steamer Ansaldo San Giorgio I with direct bill of lading to Philadelphia.

Sulphurated Duroni Cherries in Brine

Packages	Quality of merchandise			Weight in kilogr.	Price per 100 kg. delivered Modena	Amount
	First Choice					
U. G. 21 barrels....	235	5	230	4830		
222	185	3	182	40404		
15	150	3	147	2205		
121	36	1	35	4235		
				51674	2.65	136936.10
[fol. 206]	Second Choice					
II 8 barrels...	185	3	182	1456		
79	36	1	35	2765		
				4221	1.50	6331.50
	Revenue stamp.....					.50
	Lire Ital.....					143268.10

Italian Lire One hundred and forty-three thousand two hundred and sixty-eight with 10 centesimi.

Societa Esportazione Agricola Ligure, Savona (Italy)

Savona, July 26, 1920.

Messrs. Rheinstrom Bros., Cincinnati.

We have pleasure in handing you invoice for what you have ordered of us by contract and shipped to you to-day

per SS Ansaldo S. G. I for the amount of which you will credit us with $19085.10 payment on presentation of documents B. S. S.

Always at your service, we are

Yours very truly, —— ——.

Mark or number	Kilograms	Packages	Quality	Price	Total
R. B. Cincinnati	48000			$16.50	7920.00
	63540	845	Cherries in brine	$16.50	10166.40
					18086.40

[fol. 207]

Deducted as per contract 5%	904.30
	17,182.10
Freight to be reimbursed to us	1,903.00
Amount	$19,085.10

Merchandise delivered fob. Naples.
Insurance to be borne by purchaser.
Barrels net weight fruit 132 kg. each.

Societa Esportazione Agricola Ligure, Savona (Italy)

Savona, July 17, 1920.

Messrs The Rheinstrom Brothers Company, Cincinnati, Ohio.

We have pleasure in handing you invoice for what you have ordered of us by contract and shipped to you to-day per SS Ansaldo S. G. I, for the amount of which you will credit us with $66,445.98 payment on presentation of documents.

Always at you service, we are

Yours very truly, —— ——.

Mark or Number	Kilograms	Packages	Quality	Price	Total
R. B. M. o.	103060	792	Cherries in brine at 130 kg. each barrel net weight fruit	$16.50	16988.40
R. B. V.	31680	240	Cherries in brine at 132 kg each barrel net weight fruit	$16.50	5227.20

[fol. 208]

Mark or Number	Kilograms	Packages	Quality	Price	Total
R. B. S.	248456	1883	Cherries in brine at 130 kg. each barrel net weight fruit	$16.50	41011.74
R. B. M. o.		40	Cherries rejections per barrel	$10.00	400.00
					$63627.34
			Deducted 5% until verification weight		3181.36
					$60445.98
			Amount of freight paid by us to SS. Merchandise sold fob. Genoa.		6000.00
			Total		$66445.98

[fol. 209] LIBELLANT'S EXHIBIT 7

Dates of Docket Entries in This Case Appearing in Libellant's Exhibit 3, Supplemented by Additional Docket Entries, Including Dates of Proceedings Before Special Commissioner

1920

Aug. 19. Date of arrival of the New York shipment on the S. S. "Ansaldo San Giorgio".

Sept. 2. Date of arrival of the S. S. "Ansaldo San Giorgio" at Philadelphia.

1922

Mar. 1. Libel filed.

Nov. 13. Answer filed.

Nov. 14. Note of issue and notice of trial served and filed.

1925

July 16. Libellant's order for closed commission to Naples.

Aug. 1. Claimant's order for closed commissions to Naples and Genoa.

Oct. 26. The three above commissions issued and forwarded to Italy.

Dec. 17. Claimant's executed commission returned from Naples and filed.

1926

May 6. Claimant's executed commission returned from Genoa and filed.

1927

Oct. 4 and 5 Case tried in the District Court.
Oct. 10. Decision rendered for libellant.
Oct. 20. Interlocutory decree filed.

[fol. 210]

Nov. 9. Notice of appeal filed and allowed and assignments of error filed.
Nov. 15. Filed order extending claimant's time to file record on appeal to December 20, 1927.

1927

Dec. 21. Filed order extending claimant's time to file record on appeal to January 21, 1928.

1928

Jan. 10. Filed order extending claimant's time to file record on appeal to January 31, 1928.
July 2. Decision of District Court affirmed per curiam; no opinion.
Oct. 22. Claimant's petition of certiorari to U. S. Supreme Court denied.

1929

Feb. 13. Order for libellant's commission to Rome.
" 28. Cross interrogatories filed.
Mar. 5. Commission issued to take the testimony of libellant's witnesses, August Kieffer and Umberto Gasperini, at Rome Italy.
May 7. Depositions returned by the American Consul and filed in the United States District Court.

1930

Oct. 11. Served notice of taking deposition of R. G. Johnson of San Francisco.
Nov. 28. Deposition returned and filed.
Dec. 23. Hearing before Commissioner.

1931

Mar. 27. Libellant's brief filed.
May Claimant's brief served and filed.

[fol. 211]

May 21. Libellant's reply brief filed.
Aug. 14. Claimant's reply brief filed.
" 24. Libellant's supplemental brief filed.
Sept. 12. Claimant's supplemental reply brief filed.
" 25. Served notice of application for reopening hearing.
" 28. Hearing and motion granted.

1931

Oct. 1. Served notice of motion for order to serve interrogatories on claimant.

" 6. Argument before Judge Bondy. Briefs thereafter exchanged and filed.

Oct. 26. Court filed opinion granting libellant's motion. Order on said motion signed and served on claimant.

Dec. 7. Hearing before Commissioner.

" 8. Claimant served and filed answers to interrogatories under oath.

1932

Jan. 8. Hearing before Commissioner.

" 26. Hearing before Commissioner. Libellant rests.

" Application by claimant for permission to take testimony in Cincinnati. Granted.

Feb. 5. Claimant's depositions taken at Cincinnati.

Mar. 2. Libellant's brief filed.

" 21. Depositions filed with Commissioner and leave granted to file additional briefs by April 4.

Oct. 17. Report of Commissioner filed.

Dec. 21. Served libellant's motion to overrule claimant's exceptions.

" 27. Libellant consented to claimant's application to adjourn argument of motion to Jan. 3, 1933.

[fol. 212] CLAIMANT'S EXHIBIT A

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

THE RHEINSTROM BROTHERS COMPANY, Libellant,

against

S. S. "ANSALDO SAN GEORGIO I," SOCIETÀ NAZIONALE DI NAVIGAZIONE, Claimant

Depositions of James A. Rheinstrom and R. Kramer, taken before Allen C. Roudebush, a Notary Public, within and for the County of Hamilton in the State of Ohio, at the office of Rheinstrom Brothers Company in Cincinnati, Ohio, on Friday, February 5th, 1932, to be read in evidence on behalf of the claimants in the above entitled action.

Appearances:

Bigham, Englar & Jones, and F. H. Prem, Proctors for Libellant.

Loomis & Ruebush, and Phillip A. Donahue, 165 Broadway, New York, Proctors for Claimant.

It is hereby stipulated and agreed between counsel, that certification, filing and signing is waived. Stenographer costs to be taxable.

[fol. 213] JAMES A. RHEINSTROM, being first duly sworn, testified as follows:

Examination.

By Mr. Donahue:

Q. What is your position with the company, Mr. Rheinstrom?

A. President.

Q. What was your position in August and September, 1920?

A. The same position.

Q. Are you familiar with the shipment of 2955 barrels of cherries and brine, another shipment of 466 casks of cherries and brine and a third shipment of 845 barrels of cherries and brine, shipped from Italy on board the steamship "Ansaldo San Georgio I", in July 1920, arriving in New York the latter part of August, 1920 and in Philadelphia in September, 1920?

A. I recall they arrived on those dates.

Q. What was done with these cherries after their delivery to you in New York and Philadelphia? Were they brought on here to Cincinnati?

A. They were loaded of course and brought to Cincinnati.

Q. All of them?

A. All that were accepted.

Q. Well now will you produce your records showing what disposition was made of these cherries?

A. You mean after they arrived at the factory? We keep no record of every barrel received at the plant. Every one of these barrels were pitted as our requirements demanded. It takes about a year to pit a whole crop of

cherries. As we needed them we pitted them but we kept no individual record of the barrels.

Q. What do you mean by pitting?

A. The stems removed and the pits removed.

Q. Well we will take the specific lots. What was done with the consignment of 845 barrels of Cherries and Brine [fol. 214] that were delivered from the steamer?

A. They were stored in a warehouse and as I said, as we needed them we pitted them along with other cherries we had in the warehouse.

Q. And the same thing happened with the other two lots, that is the lot of 2955 barrels and the lot of 466 casks?

A. Yes, all of the shipments that came in were stored in our warehouse and as we needed them we pitted them.

Q. And when was the last of the cherries used?

A. As I said before, it required a year to consume all of the cherries that were brought in from any one crop. By the time the new crop was available the old crop should be consumed.

Q. What use was made of the cherries after they were put through a process? Would you describe the process?

A. The cherries are first pitted and then washed, colored and processed in syrup, flavored and either put in bottles, or barrels or candied.

Q. Is the cherry given a name after the process is completed?

A. Well it is known as a maraschino cherry.

Q. In that process is there ever any loss of cherries as a result of selection or sorting?

A. During the pitting operation the girls grade the cherries as to size and quality, separating the whole fruit and the broken and also separating the sizes.

Q. I understand they are separated as to whole and broken and separated as to sizes. Are they separated as to condition?

A. Well the separating as to whole or broken would take care of any that are inferior. They would go into the broken.

Q. Are they separated by condition? I mean by that, condition of decay or deterioration?

[fol. 215] A. Yes, any that are shriveled would go into the broken and any that are whole would be used as such.

Q. When a cherry is shriveled can it still be used?

A. It can be used as broken.

Q. When does a cherry become shriveled? Or if you will allow me, what are the causes that create this condition of shriveling?

A. Loss of brine.

Q. So that if brine leaked out of the barrel in which the cherries are contained, the result would be that the cherries would shrivel? That would be the effect?

A. Yes, and the amount of brine leaking out would be responsible for the proportion of deterioration or shriveling that would take place. If all the brine leaks out and remains out for a period of days all the fruit would shrivel.

Q. But the fact that the fruit was shriveled as you say, would it prevent its being processed and being used?

A. Of course if the brine has been out for a number of days and the fruit is decomposed, it would be of no value at all and it would have to be thrown away.

Q. Well roughly, how long a time would it take for deterioration to set in after the loss of brine?

A. I would say that if the brine is out of the barrel for a total of seven to ten days that the fruit would then be practically worthless.

Q. Now if some of the brine is lost out of the barrel of cherries—let us say ten per cent of the brine leaks out, would that necessarily cause any damage to the cherries?

A. The cherries that are submerged in the other ninety per cent of the brine would be in good condition and those above that mark would all shrivel.

Q. They would be shriveled?

A. Yes, and if they are dry long enough they would be- [fol. 216] come worthless, but if they were not dry too long they would have a value to them.

Q. But the fact that the cherry is shriveled does not mean that its value is lost, is that right?

A. It has a value as a broken fruit which is sold at a considerably lower price and often at a loss.

Q. You mean by a loss—if the cherry was purchased as a sound cherry and then as a result of loss of brine became shriveled, it might have to be sold at a price less than you would have gotten had the cherry been sound?

A. That is correct.

Q. Do you recall whether in the three lots in question any of the cherries were shriveled?

A. Yes, they were.

Q. Do you remember or have you any way of refreshing your memory as to the approximate quantity that were shriveled?

A. I just remember that there were a tremendous lot of shriveled cherries but I cannot remember the exact proportion. That was about twelve years ago.

Q. Do you have any records that would show the quantity of these cherries that were shriveled?

A. Only the record that was made by the surveyor.

Q. Do you have any records in your possession now or in the possession of your firm or company which show the quantity that were shriveled?

A. The only record would be a copy of the surveyor's report.

Q. Assuming then that the survey stated that in the 845 barrel lot eleven barrels were damaged 10%. Do you take that to mean that 10% of the cherries in each of the eleven barrels were shriveled?

A. That would mean that if the value of the barrel in prime condition was $20.00 for same, that after the shriveling, you would deduct 10% making the value then $18.00. [fol. 217] That the cherries that were left were worth $18.00 instead of $20.00.

Q. But it does not mean that ten per cent of the cherries in that barrel were shriveled?

A. No, it does not mean that ten per cent were shriveled, it means that the value of those left in the barrel is ten per cent less.

Q. Because of those shriveled cherries?

A. Because of the damage done in transit.

Q. But the cherries in those barrels that were shriveled could nevertheless be used by you?

A. Yes, they were used as broken cherries.

Q. And they were used in this instance?

A. Any that were shriveled were used as broken and any that were prime were used as whole.

Q. Have you any records, papers, documents or memorandum or any sort here in your possession or in the possession of Rheinstrom Bros. Co. that will show the exact disposition that was made of these three consignments of cherries?

A. We haven't any record other than to show that the barrels were received and as was customary, the contents

of every barrel was pitted in the course of requirements of business for the season.

Cross-examination.

By Mr. Prem:

Q. When these three shipments of damaged cherries were received at your factory, as I understand, they were placed in a warehouse together with other shipments you previously received and as the requirements of your business would make demand upon you, you would withdraw from the warehouse various barrels of cherries to be taken into your sorting room?

A. They were stored in two warehouses to be exact.

Q. Was any effort made to sort shipments as a unit [fol. 218] and dispose of them as a unit or were they commingled with other shipments?

A. The barrels that arrived in good shape would be commingled with other deliveries of prime cherries and those that were shriveled would be commingled with ones that were shriveled but they would be used during the season as our requirements demanded regardless of the particular lot in which the fruit arrived.

Q. Will you please describe what is done with a barrel of cherries when it is withdrawn from the warehouse and taken to the sorting room in the factory?

A. The head is removed, the fruit is taken out in basins and placed on the pitting table, every girl receiving one or two basins, and then pit the cherries and grade according to quality and size, separating the whole fruit from the broken. After that they are washed, colored and flavored in syrup.

Q. How many girls did you have employed in your sorting room at the time these shipments were processed?

A. We had from 150 to 200 girls pitting.

Q. As I understand it, the shriveled cherries in each barrel, regardless whether they were from the three shipments in question or from shipments received prior thereto, after they were given to the girls, the shriveled cherries in any of those lots were all placed in one container without an effort to segregate them as to lots?

A. You mean after they were pitted?

Q. Yes.

A. Well, all broken cherries would be placed in a barrel regardless of the lot from which they came.

Q. After the cherries were placed in bottles for disposition to your customers, is there any method by which [fol. 219] you could state which of the containers ready for sale, contained the cherries from the three shipments in question?

A. That would be impossible.

Q. As a result of the method which you describe for preparing cherries for sale, is this the reason you have no record to show the ultimate disposition of these three shipments in question.

A. Yes.

Redirect examination.

By Mr. Donahue:

Q. Do I understand you have no record at all, Mr. Rheinstrom?

A. No other than I have already mentioned.

R. KRAMER, witness called on behalf of claimant being first duly sworn, testified as follows:

Direct examination.

By Mr. Donahue:

Q. Do you have any records Mr. Kramer showing whether you made a profit or suffered a loss on this shipment, that is to say, any records which would show whether you received more or less than the invoiced price?

A. This would come under Mr. Rheinstrom's jurisdiction and I would have no authority in stating whether there was a profit or loss.

Q. Do you have any records under your control that show exactly what was done with these three consignments of cherries?

A. I have no records.

Q. Did you have anything to do with these cherries after they arrived at the premises here in Cincinnati?

A. Nothing.

Q. Do you agree with Mr. Rheinstrom that cherries can [fol. 220] never be used after they are shriveled?

A. I agree in so far that they can only be used as broken cherries.

Q. What is the use to which broken cherries are put?

A. Broken cherries are sold principally to ice cream manufacturers.

Q. And for what purpose are they used by ice cream manufacturers, if you know?

A. Well, I suppose mixed with ice cream.

Q. Broken cherries have a ready market as such, do they not?

A. I would not say a ready market.

Q. What I mean by a ready market is that there are manufacturers or others who have need and use for broken cherries. Such as the ice cream manufacturers that you mention.

A. Yes there is, but the price for broken cherries would be considerably under the whole cherry price.

Q. Some of the cherries in the three lots were broken cherries and were purchased by your company as broken cherries, isn't that true?

A. I would have to look in the records.

(Mr. Donahue: I think one of the exhibits shows that. Here it is Exhibit No. 7 page 153 of the records in this case.)

(Witness reads exhibit.)

Witness: Does that mean second quality there (indicating)?

Mr. Donahue: Yes (shows him translation of exhibit).

Witness: They had a mark on the head to distinguish the difference.

Mr. Donahue: What had a mark on the head?

Witness: If there were any broken cherries in the lot the heads were marked accordingly.

[fol. 221] Cross-examination.

By Mr. Prem:

Q. Your connection with this shipment was when it arrived at New York, you were present at the dock to receive it?

A. Yes.

Q. What else did you have to do with this shipment?

A. Well to see that any damaged barrels were put in good condition, that is, the barrels had to be recoopered to hold water. The barrels were filled with water.

Q. Were you present with Mr. Johnson all the time he surveyed these cherries?

A. I was with him all the time.

Q. Did Mr. Johnston's method of surveying these cherries differ from any other survey?

(Mr. Donahue: I object as to whether it did or not.)

A. No we had no survey made and the method was the same.

Q. Did you agree with Mr. Johnston as to the extent of the damage?

(Mr. Donahue: I object to the question as immaterial.)

A. Several times we had an argument as to the extent of the damage.

Q. What was the nature of this discussion?

(Mr. Donahue: Note my objection.)

A. Well at times I felt that the damage was more than the percentage he decided on. Sometimes he would object and other times he would agree with me if the damage was as great as I would say it was.

[fol. 222] Q. Based on your experience in examining damaged cherries, what would you say as to the correctness of Mr. Johnston's decision as to the extent of the depreciation?

A. I think Mr. Johnston was generally fair in his examinations.

Q. And estimates?

A. And estimates, yes.

Q. Were you also present at Philadelphia while the cherries were at the Steamship Company's docks there?

A. I was present as the New York shipment was completed. I went down to take care of the Philadelphia lot.

Q. Where was that lot reconditioned?

A. I think it was Pier 40.

Q. It was on the dock where they were discharged?

A. It was already discharged when I got there.

Q. Were they removed from the dock before they were reconditioned?

A. No they were reconditioned right on the dock.

Q. What period of time would that consume?

A. Two weeks.

Q. Were any of the representatives of the Steamship Company in the vicinity during that time?

(Mr. Donahue: Objection on the ground that the witness' knowledge of connection of anybody there with the steamship company is not shown.)

A. The delivery clerk.

(Mr. Donahue: Objection withdrawn.)

Q. He was the Delivery Clerk of the Steamship Company that delivered these cherries to the dock?

A. Yes.

[fol. 223] (Mr. Donahue: Objection to that characterization "Delivery Clerk" as being only the characterization and no identification of the person shown.)

Q. Do you know the Delivery Clerk's name?

A. It is an Italian name. I would have to think about that. Could I look at the records to make sure? (Witness looks up records.) Balletta is the name of the Delivery Clerk. It was Pier 40.

Q. I understand you employed one of his relatives to assist you in this work, is that true?

A. I had his son fill barrels with water after five o'clock in the evening.

Q. These second selection choice cherries that you referred to a moment ago were they also known as "culls"?

A. I never heard them called that.

Q. What is the nature of the condition which gives them the designation of second choice?

A. I would not call them even broken cherries, they would be more spotted cherries that could not be used for first class cherries.

Q. Is there anything wrong with the quality of fruit of this cherry?

A. They are often very much spotted.

Q. It goes to their appearance, they are not deteriorated?

A. No they are not deteriorated.

Q. The second choice fruit would not be fruit that had become deteriorated?

A. Not deteriorated, only spotted or having a brownish cast.

Redirect examination.

By Mr. Donahue:

Q. What is the spot caused by?

A. I think by the sun.

Q. Doesn't the spot have to be cut out before it is used? [fol. 224] A. They were generally mixed in with the broken cherries.

Q. There is no doubt about it that the spotted cherries have not the commercial value of the sound cherries?

A. No doubt.

Q. Before cherries are purchased they should be sorted out as to good and bad fruit. By that I mean no bad fruit should be left in with the good fruit. No doubt about that is there?

A. No.

Q. Isn't it true Mr. Kramer that before a lot of cherries are shipped from abroad they should be properly sorted out?

A. Yes that is true.

Q. And you agree Mr. Kramer that shriveled cherries can be put to the same uses that broken cherries are put?

A. Yes that is all they can be used for.

Q. So that the shriveled cherries in this lot if there were any were undoubtedly put to some use by your company?

A. Well they could only be used as broken or crushed cherries.

Q. They were undoubtedly used for that purpose in this instance?

A. They could not be used for anything else.

Q. They were not just thrown out, they were used?

A. The ones that I forwarded to Cincinnati were used, but the ones that were left on the dock were sent to the dump as far as I know.

Q. Do you know what quantity were left on the dock?

A. No I do not recall, I would have to consult the records.

Q. Do you have any records that you could consult?

A. What records we already referred to. I don't know whether I have any record or not. We left a certain number of barrels at the pier at Philadelphia.

Q. About fifty barrels?

A. I could not say.

[fol. 225] Q. Could you approximately say it was more than five barrels?

A. Yes.

Q. As much as ten barrels?

A. Yes.

Q. As many as fifteen?

A. Yes.

Q. As many as twenty?

A. I don't remember.

Q. Are you satisfied with Mr. Johnston's finding? Did you finally agree with him that he fairly represented the loss?

A. Yes.

Q. Isn't it true Mr. Kramer that after the cherries had been put through the process here that the damage for depreciation, in any particular reference to any particular barrel, might have been less than you had supposed it to be?

A. No I don't think so.

Recross-examination.

By Mr. Prem:

Q. How did Mr. Johnston examine this fruit?

A. The barrels were all lined up with the bungs out.

Witness JAMES A. RHEINSTROM recalled:

Direct examination.

By Mr. Donahue:

Q. Do you have any record Mr. Rheinstrom that would show exactly what amount of money you received for these three consignments of cherries? That is to say after they had been processed?

A. No they just went into our general sales.

Q. So that you do not know then whether you profited or lost on this consignment?

A. No I would not have any way of knowing.

Cross-examination.

By Mr. Prem:

Q. Mr. Rheinstrom you know the market value of these cherries when in prime condition. Did they sell at the same [fol. 226] price as prime cherries would sell and did the cherries in their broken condition sell at the same price cherries in their broken condition would sell for?

A. Well, the shriveled cherries are sold as broken and the prime cherries are sold as whole cherries.

Q. Well isn't it a fact then that you did not receive the whole value for this shipment?

A. Well they were sold during a certain year and the sales went into our volume for that particular year. Broken cherries were sold as broken and prime cherries were sold as prime cherries. But if all of these cherries were prime cherries our sales would have been greater.

Q. Because they became broken, did you stand a loss on these shipments?

A. The volume of our sales was diminished on that account.

Mr. Donahue: Have you any way of showing what the loss was?

A. The loss of our sales? It probably could be computed but that would be a rather technical thing to do.

Q. It could be done but it would be with difficulty?

A. Yes.

Mr. Prem: But could it be done at all because of the co-mingling of shipments?

(Mr. Donahue: I object to that. Mr. Rheinstrom stated that it could have been.)

A. It could be done but it would be almost impossible. There are some things almost impossible to do and that is one of them.

Q. Was that because the shipments were co-mingled?

A. Well that would make it almost impossible.

[fol. 227] Q. It would be necessary to trace every barrel through its various stages of processing and placing in containers and ultimate sale?

A. Yes, but the figure you would arrive at would only be an estimate.

Q. Well could it be possible to trace the shipments through your books at this time?

(Mr. Donahue: I object to the question.)

A. Well I would say it is practically impossible. That is about 99½% impossible.

Q. Did you accept Mr. Johnson's estimate as to the extent of loss in this shipment?

(Mr. Donahue: I object, the question is misleading.)

A. Yes.

By Mr. Donahue:

Q. Mr. Rheinstrom, assuming that the barrel of cherries was said to be depreciated 75%. Now isn't it true that if those cherries in that barrel were reconditioned that it might be found that some of the cherries could be used with broken cherries and that the loss therefore would not total 75%?

A. In some cases the loss might be more and in some cases less, but on an average, the appraisal that was made was a fair one, it represented the actual value of the fruit.

Q. But you agree that if the cherries had been reconditioned, it might be found, with reference to a particular barrel, the loss might not be 75% depreciation.

A. I think the answer that I just made covers that. I could just repeat the same answer that I made.

[fol. 228] Certificate

STATE OF OHIO,
Hamilton County, ss:

I, Allen C. Roudebush, a Notary Public in and for the County and State aforesaid, duly commissioned and qualified do hereby certify that the above named James H. Rheinstrom and R. Kramer, were by me first duly sworn, to testify the truth, the whole truth and nothing but the truth, and that the depositions of said witnesses was re-

duced to writing by Margaret Moorman, and signing of same was waived by stipulation of counsel herein.

In testimony whereof, I have hereunto set my hand and official seal this 10th day of February, 1932.

Allen C. Roudebush, Notary Public, Hamilton County, Ohio.

My commission expires December 23, 1933.

[fol. 229] In United States District Court, Southern District of New York

A. 82-357

[Title omitted]

Report of Special Commissioner

To the Honorable the Judges of the District Court of the United States, for the Southern District of New York

The libel in this action was filed to recover for damage to three shipments of cherries in brine, delivered to the claimant at Genoa and Naples in July, 1920, for transportation and delivery at New York and Philadelphia, the shipments having arrived at said ports in a damaged condition.

The case was tried before Honorable Francis A. Winslow, District Judge, October 4, 1927, and resulted in an interlocutory decree in favor of libellant, which was affirmed by the Circuit Court of Appeals without opinion and certiorari was denied on October 22, 1928.

The interlocutory decree directed that the libellant recover from the Steamship "Ansaldo San Giorgio I", the amount of its damages arising out of the matters set forth [fol. 230] in the libel, together with interest and costs, and that it be referred to the undersigned to ascertain and compute the amount of libellant's damage.

I, John E. Morrissey, the Commissioner to whom the matter was referred, respectfully report as follows:

1. To establish the condition, quality and weight of the cherries in these shipments when delivered to the claimant, libellant addressed written interrogatories to two witnesses abroad, August Kiefer and Umberto Gasperini.

Kiefer was the European representative of the libellant. His duties were to purchase cherries, visit the various packing places and supervise the preparation of the cherries for shipment. This included the inspection and weighing of the fruit. Gasperini was formerly employed by libellant and was assistant to Kiefer at the time the shipments in question were made.

As three shipments are involved in this action, I will, for convenience, consider each shipment separately.

Lot 1—8,955 Barrels of Cherries

This shipment was purchased from the Societa Exportazione Agricola Ligure, of Savona, Italy. Kiefer supervised the preparation, inspection, weighing and packing of this shipment. It appears that the cherries were first sorted and all the bad fruit eliminated. They were then sulphured or fumigated, which process preserves them for some time. After being thus treated, the cherries were again sorted [fol. 231] and put in barrels. The barrels used for this lot, although previously used, were in good condition and had been burned, cleaned and paraffined on the inside. Each barrel was weighed and while on the scale was filled with sound cherries up to the net weight shown in the commercial invoice (Exhibit 7, p. 154). Before closing the barrel, a brine solution was added which acted as a preservative. The barrel was again weighed and the net content ascertained. Each barrel was again inspected and initialed by Kiefer before delivery to the carrier for transportation to the loading port. It also appears that Kiefer or Gasperini was present during the entire time the cherries were being prepared, weighed and packed for shipment.

Complaint is made that as part of this lot was prepared and packed for shipment at places other than Savona and Modena, the witnesses had no knowledge as to the condition and weight of the contents of the barrels packed at the other places. The testimony, however, is clear that the small number of barrels of this shipment that were packed at Vogera and Verona, were first shipped to Savona where the heads were removed for inspection of the fruit and a checking up of the weight.

Of this lot, 2,163 barrels in good condition were shipped by rail from Savona to Genoa, the loading port, a distance of 25 miles, and 792 barrels in good condition were shipped

by rail from Modena to Genoa, a distance of 175 miles. Both shipments were made about the middle of July, and the steamship bill of lading issued for this lot is dated July 17, 1920. It appears further, that Gasperini, whose duties required him to look over the shipment at the loading port, [fol. 232] saw this shipment as it was loaded onto the steamer's lighters. He testified that not more than 20 barrels showed signs of having leaked during transportation to the loading port, and that these barrels were immediately recoopered and refilled with the necessary quantity of salt water.

The bill of lading issued by claimant for this lot recites, "Shipped in apparent good order and condition." While this is no admission with respect to the condition of the contents of the barrels, it does show that there was no external evidence of damage to the barrels, and this indicates that the barrels were not leaking or contents damaged when delivered to the claimant.

The proof before the Commissioner makes it clear that the damage to the cherries was the result of the loss of brine due to injury to the barrels. It seems obvious, therefore, that if the barrels were in good condition when delivered to the claimant, so were the contents. As to the few barrels that showed signs of having leaked during transportation to the loading point, the evidence shows that the amount of brine lost from these barrels was negligible and was replaced before the barrels were delivered to claimant. Bearing in mind that the fumigation of the cherries preserved them for some time, it is improbable that any deterioration was caused to the cherries by this slight loss of brine during the short time they were in transit from the shipping points to Genoa.

The testimony of libellant's witnesses is convincing and sufficient in my opinion to establish the condition, quality and weight of the cherries and the sound condition of the barrels when delivered to the claimants. If more were necessary, libellant is entitled to the benefit of the pre- [fol. 233] sumption of continuity, i. e., things once proved to have existed in a particular state are presumed to have continued in that state until the contrary is proved. The application of the presumption of continuity to the law of carriers is well recognized. In Chicago and Northwestern Railway v. Whitnack, 258 U. S. 369, the Court said:

"The condition and quantity of the goods when they were delivered to the first of the connecting carriers, being shown, the presumption will arise that they continued in that condition down to the time of their delivery to the carrier completing the transportation and making the delivery to the consignee, and that the injury or loss occurred while they were in his possession."

To the same effect: Julius Klugman's Sons v. Ocean Steam Navigation Company, 42 Fed. (2d) 461; Gulden v. Hijos De Jose Taya S. En C, 252 Fed. 577.

While upon this feature of the case it may be noted that claimant, aside from cross-examination, offered no evidence to rebut libellant's proof as to the condition, quality and weight of the cherries, and the condition of the barrels.

I find therefore that 792 barrels of this shipment were filled with sound cherries of the net weight of 130 kilos each; that 2,123 barrels were filled with sound cherries of the net weight of 132 kilos each; and that 40 barrels contained culls or Scarto cherries, and that this shipment of 2,955 barrels was delivered to the claimant in good order and condition.

[fol. 234] Lot 2—466 Cask Shipment

This shipment was purchased from Ghisetti Antonio and Cia, and prepared for shipment at the factory of that Company in Modena. Kiefer purchased this lot of cherries and personally supervised the preparation, weighing and shipment of them. The testimony shows the cherries were processed, weighed and packed in the same manner as those in the 2,955 barrel shipment, except that the barrels used for this shipment were new. It also appears that Gasperini looked over the barrels of this shipment in Genoa at the time they were unloaded from the railroad cars and loaded onto the lighters and found that they were all in sound condition, with the exception of about 10 barrels that bore evidence of damage during rail transportation. These barrels were immediately recoopered and refilled with the necessary amount of brine.

Claimant's contention that some of the cherries of this lot were in bad condition at the point where they were prepared for shipment and that these bad cherries may have contaminated the sound cherries, is without merit. Kiefer's

testimony clearly shows that the spotted fruit was separated from the unspotted fruit and the invoice for this lot (Exhibit No. 7, Rec., p. 153) shows the spotted fruit was shipped in different barrels. It also appears that the spotted cherries were sound fruit, but because of the spots were classed as second quality.

For the reasons stated as to Lot 1, which apply with equal force to this shipment, I find that libellant has proved that of this shipment of 466 barrels, 21 barrels contained [fol. 235] sound fruit of good quality, weighing 230 kilos net fruit each; 222 barrels contained sound fruit of good quality, weighing 182 kilos net fruit each; 15 barrels contained sound fruit of good quality, weighing 147 kilos net fruit each; 121 barrels contained sound fruit of good quality, weighing 35 kilos net fruit each; 8 barrels contained second quality fruit, weighing 182 kilos net fruit each; and 79 barrels contained second quality fruit, weighing 35 kilos net fruit each. I also find that this shipment of 466 casks containing sound fruit of the quality indicated, was delivered to the claimant in good order and condition.

Lot 3—845 Barrel Shipment

This shipment was purchased from the Societa Exportazione Agricola Ligure, of Savona, Italy, and was prepared for shipment at Maddaloni Inferiori and Baiano, short distances from Naples, at which port this lot was delivered to claimant.

The testimony with regard to this lot shows that the same was purchased, processed, inspected, weighed, packed and shipped under the supervision of Kiefer and his assistant, Gasperini, in the same manner as Lots 1 and 2.

For the reasons heretofore stated with regard to Lots 1 and 2, I find that the 845 barrels comprising this shipment were filled with sound cherries, first quality, of the net weight of 132 kilos net weight fruit each, in sound containers, and that the same were delivered in like good order and condition to the railroad for transportation to Naples.

It does not appear that either Kiefer or Gasperini saw the barrels comprising this shipment at Naples. The bill [fol. 236] of lading (Exhibit No. 3) issued for this shipment, however, acknowledges receipt of the 845 barrels in apparent good order and condition.

Libellant is entitled to the presumption of continuity, and for the same reasons stated with reference to Lot No. 1, I find that Libellant has proved that the 845 barrels comprising this shipment contained sound cherries of good quality of the net weight of 132 kilos each, and the same were delivered to claimant in good order and condition.

2. Proof as to the extent of the damage to the three shipments has been furnished by Rudolph G. Johnson, an experienced and competent cargo surveyor. Johnson examined and estimated the damage to these shipments as a representative of Kohler, Kemp & Kohler, who were employed by the underwriters of the cargo to ascertain the cause and extent of the damage. Johnson, as representative of the underwriters, would naturally be interested in keeping the damages down. In this respect, the interest of Johnson and the claimant was the same. His testimony, therefore, is especially trustworthy against any claim by claimant that he over-estimated the damage.

The "Ansaldo" arrived at New York where she discharged the 845 barrel shipment, and then proceeded to Philadelphia, where she discharged the other two shipments involved in this action. Johnson first examined the 845 barrel shipment on the ship. He found many of the barrels more or less seriously crushed at the bilges; that a quantity showed signs of leakage; that the brine had leaked out of the barrels and the fruit rotted; and that a large quantity of cherries, and broken and crushed barrel staves [fol. 237] were found lying on the floor of the compartment. After the barrels were discharged from the ship to claimant's dock, a representative of the libellant segregated the damaged barrels and every barrel on which there was any question of damage was examined. After completing his examination of this shipment at New York, Johnson proceeded to Philadelphia and examined every barrel of the other two shipments on which there was any question of damage. The method used to determine the extent of the damage was the same for all shipments. The bung was removed from the barrel and a trier or sampler was inserted and shoved to the bottom of the barrel and then pulled out and cherries obtained from the bottom, center and top of the barrel, several handfuls of cherries were taken from each barrel, placed in a pan and these cherries were then carefully examined to determine the proportion

of cherries that were damaged and to what extent the damaged cherries could be used. Based on his personal examination of each barrel and his years of experience in examining and estimating damage on cargo of this type, Johnson testified to the number of barrels of cherries that were damaged and the extent of the damage as to each barrel.

It is claimed that the method of ascertaining and proving the damage to the cherries is improper. Claimant's argument that in order to determine the extent of the damage it was necessary to remove the head of each barrel, is not persuasive. To do so would have been more expensive than the method used and would have increased the damages which libellant was bound to mitigate. The method employed was the usual method of examining cherries in barrels used in the trade by importers and by [fol. 238] cargo surveyors. It was expeditious, economical and reasonably accurate, and in my opinion, proper.

Damage to cargo may be proved by the estimates of trained men who have examined the cargo and have expert knowledge. This is definitely established by the case of The Rosalia, 1931 A. M. C. 86, affirmed 264 Fed. 285.

It is also claimed that Johnson's estimates were not admissible in evidence for the reason that claimant was given no notice and did not attend the survey at which the estimates were arrived at. The survey itself was not evidence against the claimant because it had not attended (The Pennsylvania Railroad Co. v. Downer Towing Co., 11 Fed. (2d) 466, 468; The Westchester, 254 Fed. 576), but Johnson was not precluded from testifying as to the damage he found while attending the survey. It seems to me, the most that can be urged under such circumstances, is, that such testimony should be most carefully scrutinized and weighed accordingly.

Aside from the cross examination of Johnson, the claimant has offered no proof as to the extent of the damage to these shipments. As heretofore stated, Johnson was interested in keeping the damage down. His interest in this respect was adverse to that of the libellant, and I accept his testimony as to the extent of the damage sustained to each shipment, except as to one lot in the 466 barrel shipment, where I am convinced that he is mistaken. This mistake, however, does not require the rejection of his testimony as

to the extent of damage sustained to the balance of these shipments. The Rosalia, 264 Fed. 285, 289, 2 C. C. A.

3. Libellant contends that the provision in the bill of lad- [fol. 239] ing limiting the recovery to the invoice value of the goods is invalid because there is no evidence that the limitation is based on, or the shipper was offered a choice of rates. Claimant on the other hand, contends that the provisions of the bill of lading are valid and binding on libellant. Each of the three bills of lading contain the following provisions:

"It is mutually agreed as follows:

* * * * * * *

3. The value of each package receipted for as above, does not exceed the sum of $100.00, unless otherwise stated herein, on which basis the rate of freight is adjusted.

* * * * * * *

11. In the event of claims for loss, damage or short delivery, the same shall be adjusted on the basis of the invoice value of the entire shipment, adding expenses necessarily incurred."

Aside from the bills of lading introduced in evidence by the libellant, there is no evidence in the record that the shipper was given a choice between the rate on which the goods were carried with the limitations expressed in the bill of lading and a rate without limitation.

Where a carrier seeks to limit its common law liability by stipulations in its bill of lading, two things are essential, first, there must be some special consideration moving to the shipper for such limitation of liability, such as a choice of rates (Hart v. Pennsylvania Railroad Co., 112 U. S. 331; Boston & Maine Railroad v. Pipper, 246 U. S. 437), and second, a rate based on a choice between limited and unlimited [fol. 240] liability (Union Pacific Railroad Co. v. Burke, 255 U. S. 317).

In the present case, Section 3 of the bill of lading contains the following words, "on which basis the rate of freight is adjusted". This is prima facie evidence that the shipper was given a choice of rates. (Caledonier, 37 Fed. (2d) 257, 259; Leyland & Co. v. Hornblower, 256 Fed. 289,

293; Glanzer v. Cunard Steamship Co., Ltd., 214 App. Div. 473, 479). But the bill of lading does not give the shipper a choice between limited and unlimited liability. The rate charged limits the shipper to a choice between a limitation of $100.00 per package and a limitation to invoice value. No choice is given the shipper between either of said limitations and no limitation at all. Such attempted absolute limitation of liability, regardless of the rate paid, makes the limitation clause void.

Merauke, 31 Fed. (2) 974; Kilthau v. International Mercantile Marine Co., 245 N. Y. 361; Straus & Co. v. Canadian Pacific Railway Co., 254 N. Y. 407; Carso, 1932 A. M. C. 1236.

The measure of recovery, therefore, is the market value of the cherries at destination.

4. The only proof as to the market value of the cherries at destination was furnished by the witness, DeRedon, an importer of this commodity for eighteen years.

He testified that during the months of August and September, 1920, he sold cherries in brine, imported from Italy, to manufacturers of maraschino cherries in New York, Philadelphia and other places. That he sold about ten thousand barrels that year, the bulk of it during the month of August. That the market value of such cherries at New [fol. 241] York and Philadelphia was ten cents (10¢) per pound. At that time there were but two grades of cherries,—prime or whole cherries, and scarto or broken cherries, which were classed as second quality fruit.

The testimony of this witness is not disputed. Here again, claimant, except for cross examination of the witness, failed to offer any evidence to rebut libellant's evidence of market value.

I therefore find libellant's damage as follows:

2,955 Barrel Lot

Damage as ascertained by R. G. Johnson, cargo surveyor (Dep. pp. 14-16) is as follows:

51 bbls.	damaged	10%	5.10 bbls.
35 "	"	15%	5.25 "
8 "	"	20%	1.60 "
100 "	"	25%	25.00 "
79 "	"	40%	31.60 "

116 bbls.	damaged	50%	58.00 bbls.
95 "	"	60%	57.00 "
89 "	"	75%	66.75 "
3 "	"	85%	2.55 "
42 "	"	90%	37.80 "
97 "	"	100%	97.00 "
			387.65 bbls.

It will be noted from the commercial invoice (Exhibit 7, p. 154), that this lot was made up of barrels of 130 and 132 kilos each. As the surveyor did not obtain the marks identifying the 130 and 132 kilo barrels, claimant will be given the benefit of the doubt and it will be assumed that all the [fol. 242] barrels damaged were of the 130 kilo size.

130 kilograms per bbl. at 2.204		286.520 lbs.
387.65 bbls. at 286.520	111,069.47	lbs.
111,069.47 at 10¢ per lb.	$11,106.94	
Credit proceeds of sale of 97 bbls.	50.00	
	$11,056.94	

466 Barrel Lot

The commercial invoice (Libellant's Exhibit 7, record, p. 153), covering this shipment, shows that the cherries were of first and second quality and the barrels of different weights. As there is no proof of the market value at destination of second quality cherries, claim for damage to these cherries will not be allowed.

35 Kilo Lot

It will be noted from the invoice, that barrels of the weight of 35 kilos appear in both the first and second selections. The second selection barrels bore the mark "II". The failure of the surveyor to obtain the marks identifying the quality of the cherries in the damaged barrels makes it impossible to determine which quality cherries of this lot were damaged, and because of the insufficiency of the proof in this respect, no damage will be allowed on the 35 kilo lot.

Damage as ascertained by R. G. Johnson (Deposition, pp. 17, 18), is as follows:

182 Kilo Lot

1 bbl.	damaged	10%	.10 bbls.
1 "	"	15%	.15 "

[fol. 243]

6 "	"	25%	1.50 "
6 "	"	40%	2.40 "
15 "	"	50%	7.50 "
18 "	"	60%	10.80 "
1 "	"	65%	.65 "
30 "	"	75%	22.50 "
1 "	"	85%	.85 "
12 "	"	90%	10.80 "
4 "	"	100%	4.00 "
			61.25 bbls.

In this 182 kilo lot it will be noted there are 8 barrels of second quality cherries. In view of the uncertainty caused by the surveyor's failure to retain the marks on the damaged barrels, claimant will be given the benefit of the doubt and it will be assumed that the 8 barrels which sustained the greatest damage contained cherries of the second quality. The testimony shows that 4 barrels of this lot were damaged 100% and 12 barrels damaged 90%. The 8 barrels of the second quality cherries on this basis show a loss of 7.60 barrels, leaving a loss on the first quality cherries of 53.65 barrels.

182 Kilo Lot

182 per bbl. 2.204 lbs.	401.128 lbs.
53.65 bbls. 401.128	21,520.51
21,520.51 at 10¢ per lb.	$2,152.05

230 Kilo Lot

It will be noted from the bill of lading and the commercial invoice covering this shipment (Libellant's Exhibit 2, page 143; Exhibit 7, page 173), that only 21 barrels of the 230 kilo sizes were shipped. It is obvious, therefore, that [fol. 244] Johnson was in error when he testified that he examined 41 barrels of the 230 kilo size.

This error, coupled with the failure to obtain the marks identifying the particular barrels, renders it impossible to determine exactly the loss on this 230 kilo lot. Under the circumstances, any attempt on the part of the Commissioner to say how many of the 230 kilo barrels were among the 41 barrels examined, and to what extent they were damaged, would be mere speculation, and substituting surmise and conjecture for proof. Owing to the insufficiency of the proof, no damage will be allowed on the 230 kilo lot.

845 Barrel Lot

Damage as ascertained by R. G. Johnson, cargo surveyor (Deposition, pp. 12-13), is as follows:

11 bbls.	damaged	10%	1.1 bbls.
9 "	"	15%	1.35 "
20 "	"	25%	5. "
13 "	"	40%	5.2 "
12 "	"	50%	6. "
29 "	"	60%	17.4 "
31 "	"	75%	23.25 "
14 "	"	90%	12.6 "
16 "	"	100%	16. "
			87.90 bbls.
45 bbls. short delivered (Kramer Record, fol. 93)			45.
			132.9 bbls.
132 kilograms per bbl. at 2.204 lbs.			290.928 lbs.
132.9 bbls. at 290.928 per bbl.			38,664.33
38,664.33 lbs. at 10¢ per lb.			$3,866.43

[fol. 245] 5. The allowance of interest in this case is discretionary. The Scotland, 118 U. S. 507, 518. In deciding this question, I am guided by the considerations expressed in the Benjamin A. Van Brunt, 1930 A. M. C. 2003, 2007.

Libellant's cause of action on the New York shipment accrued in August 1920, and on the Philadelphia shipments in September 1920. The libel in the action was filed March 1, 1922. The correspondence which passed between counsel during that time shows that counsel for libellant, on April 18, 1921, indicated their intent to file a libel in the action, but refrained from doing so and from attaching one

of claimant's vessels, pending authorization of claimant's attorney to appear for the S. S. "Ansaldo San Giorgio I" and file the usual stipulations (Exhibit 4A). On December 13, 1921, Claimant's counsel agreed to appear in the prospective action and file the usual stipulations. I am not inclined to penalize libellant for delays due to courtesies extended, and therefore find that there was no undue delay in bringing the action.

The action was at issue and noticed for trial on November 14, 1922. The case was tried on October 4, 1927. Between these dates nothing was done except during the period between July a id December 1925, when orders for commissions to Italy were obtained, interrogatories prepared, and the commissi n issued and returned. Four years and eleven months elapsed between the time the case was at issue and the time it was reached for trial.

It is essential to bear in mind, however, that an action brought in this Court in 1922 would not have been reached [fol. 246] in its regular order for trial in less than three years. Had the orders for the commissions to Italy been obtained, and the interrogatories prepared at any time during the years 1923 or 1924, libellant would have been in position to try the action in November 1925. No satisfactory explanation has been offered for the delay in taking out these commissions.

I find, therefore, that libellant is properly chargeable with a delay of one year and eleven months in bringing the action to trial.

Following the trial, claimant promptly appealed to the Circuit Court of Appeals, and upon affirmance of the decree, promptly applied to the United States Supreme Court for a writ of certiorari to review the decision of the Circuit Court of Appeals. Its application for a writ of certiorari was denied October 22, 1928.

It appears from the correspondence, that between December 1, 1928 and January 31, 1929, efforts were made by the parties to adjust their differences. Their efforts being unsuccessful, libellant, on February 13, 1929, obtained an order for a commission to Italy to take the testimony of two witnesses for the purpose of proving damages. Interrogatories and cross-interrogatories were promptly pre-

pared and settled and the commission was returned in May 1929. The case remained in statu quo from May 1929 to November 1930, when the deposition of R. G. Johnson was taken in San Francisco. The unexplained delay of one year and six months in taking the deposition of Johnson should deprive libellant of interest for that period.

The first hearing before the Commissioner was held December 23, 1930. Such delays as there were before the Commissioner are chargeable equally to both parties.

[fol. 247] Taking everything into consideration, I find that libellant should receive interest, except for the three years and five months of delay with which it is chargeable, and that the loss of such interest for such period is sufficient penalty for its delays.

Summary

Loss on 2955 bbl. lot	$11,056.94
Interest 9/2/20 to 10/17/32, less penalty of 3 yrs. 5 mos	5,777.25
Loss on 466 bbl. lot	2,152.05
Interest 9/2/20 to 10/17/32, less penalty of 3 yrs. 5 mos.	1,124.45
Loss on 845 bbl. lot	3,866.43
Interest 8/17/20 to 10/17/32, less penalty of 3 yrs. 5 mos	2,029.87
Total	$26,006.99

I therefore find and report the total amount of damages, with interest to date, to be the sum of $26,006.99.

All of which is respectfully submitted.

John E. Morrissey, Commissioner.

Dated New York, New York, October 17, 1932.

[fol. 248] In United States District Court, Southern District of New York

A 82,357

[Title omitted]

Exceptions to the Report of the Commissioner Assessing Damages

The claimant hereby excepts to the report of the Commissioner assessing the damages herein and by him filed

the 18th day of October, 1932, for the following causes and in the following respects, that is to say:

First. In that the Commissioner erred in holding to be void and of no effect the following clause:

"It is mutually agreed as follows: * * *

Eleventh. In the event of claims for loss, damage or short delivery, the same shall be adjusted on the basis of the invoice value of the entire shipment, adding expenses necessarily incurred."

Second. In that the Commissioner erred in finding the measure of recovery to be the market value, in sound condition, of the cherries at destination.

[fol. 249] Third. In that the Commissioner erred in refusing to limit the libellant's damages to the difference, if any, between the value of the entire shipment, in its damaged condition, at destination and the invoice value of the entire shipment.

Fourth. In that the Commissioner erroneously based his findings as to the amount of the libellant's damages not upon any testimony as to the amount and value of the cherries that were lost as a result of the damage complained of, but instead upon a mere rough or general preliminary estimate made at an ex parte survey of the merchandise by the surveyor for libellant's underwriter, of which survey the claimant had received no advance notice and at which it was neither invited to be nor was represented.

Fifth. In that the Commissioner, despite the absence of any proper evidence as to the good condition of the cherries at any time prior to shipment, found that the cherries when delivered to the carrier were in good order and condition.

Sixth. In that the Commissioner erred in finding that the recital in the bill of lading "shipped in apparent good order and condition" was evidence that the contents of the barrels of the various shipments were not damaged when delivered to the claimant.

Seventh. In that the Commissioner erroneously applied for the benefit of the libellant, in order to show the good condition of the cherries and barrels at the time they were delivered to the carrier, the presumption of continuity, ap-

plicable at most only in the case of connecting carriers, i. e., [fol. 250] that things once proved to have existed in a particular state are presumed to have continued in that state until the contrary is proved.

Eighth. In that the Commissioner erred in committing an abuse of discretion in including as an item of damages interest for the period of eight years and eight months despite the fact that libellant allowed the period of twelve years to elapse from the time their alleged causes of action arose and over ten years from the time their libels were filed.

Dated, N. Y., October 22, 1932.

Loomis & Ruebush, Proctors for Claimant, 70 Pine Street, New York City.

[fol. 251] In United States District Court, Southern District of New York

A-82-357

The Rheinstrom Brothers Company, Libellant,

against

S. S. "Ansaldo San Giorgio I," Societa Nazionale Di Navigazione, Claimant

Bigham, Englar, Jones & Houston (F. Herbert Prem, of Counsel), for libellant.

Loomis & Ruebush (Homer L. Loomis, of Counsel), for claimant.

Opinion by Patterson, D. J.

Patterson, D. J.:

The libellant was the owner of three lots of cherries carried by the claimant on its ship "Ansaldo" from Italian ports to New York and Philadelphia. It brought suit for damage to the cherries in transit and prevailed on the merits. By the interlocutory decree the case was sent to a commissioner to ascertain and compute the damages. The commissioner took testimony and filed his report, finding the damages (inclusive of interest) at the

figure of $26,006.99. The case is here on exceptions taken by the carrier.

1. The commissioner held that certain provisions in the bills of lading relative to damages were void. He therefore, took as the measure of damages the market value of [fol. 252] the goods at destination at the time when delivery should have been made. This was of course the proper standard in the absence of valid agreement fixing some other measure or limitation. New York, etc. R. Co. v. Estill, 147 U. S. 591. The carrier's argument is that the invoice value of the goods had been validly agreed upon by the parties as the measure of damages and should control the recovery.

The bills of lading contained the following paragraphs:

"3. The value of each package receipted for as above does not exceed the sum of $100, unless otherwise stated herein, on which basis the rate of freight is adjusted."

* * * * * * *

"11. In the event of claims for loss, damage or short delivery, the same shall be adjusted on the basis of the invoice value of the entire shipment, adding expenses necessarily incurred."

None of the packages in the shipment had a market value or an invoice value as high as $100, and no figure was inserted in the bills of lading as to the value of the goods. It is plain therefore that paragraph 3 has no application to the facts of the case and its validity or invalidity is of no consequence. I do not mean to question its validity; on the contrary I believe it to be valid. But even if void, it is severable from paragraph 11 and of no practical importance in the case. American Railway Express Co. v. Lindenburg, 260 U. S. 584, 589-590; Kilthau v. International Mercantile Marine Co., 245 N. Y. 361, 364. The point presented then is whether paragraph 11 is a valid stipulation [fol. 253] in the shipping contract, providing as it does that any loss shall be adjusted on the basis of the invoice value of the goods plus expenses. There is nothing in the case to indicate that the carrier gave the shipper a choice of rates, one carrying this clause and the other omitting it.

It is fundamental that a carrier may by contract with the shipper agree upon variations of what would in the ab-

sence of special agreement be its responsibilities, provided such variations are reasonable and not inconsistent with public policy. New York R. Co. v. Lockwood, 17 Wall. 357, 380; Cau v. Texas & P. R. Co., 194 U. S. 427. Thus, a requirement that notice of loss be given within a time regarded as reasonable is a valid provision; and so also as to a clause that suit must be commenced within a specified period shorter than that allowed by the statute of limitations, the period being not an unduly short one. Southern Express Co. v. Caldwell, 21 Wall. 264; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657. But a special agreement exempting the carrier from liability for negligence is against public policy and void. Bank of Kentucky v. Adams Express Co., 93 U. S. 174; The Montana, 129 U. S. 397; Boston & Maine R. Co. v. Piper, 246 U. S. 439.

An agreement limiting the value of the goods in case of loss or injury to a sum less than their real value is unreasonable and void, unless the shipper is given a choice of rates based on valuation. Hart v. Pennsylvania R. Co., 112 U. S. 331; Union Pacific R. Co. v. Burke, 255 U. S. 317. The cases in the Supreme Court on limitation of value clauses have all been cases where the valuation set forth in the shipping contract as the maximum was a specified amount, [fol. 254] as $100 a package or $50 a cow. The same rule as to "choice of rates," however, has recently been applied by the Circuit Court of Appeals of this Circuit to a stipulation that the carrier's liability shall not exceed the invoice value of the goods, on the ground that such a clause also is an attempt to cut down the amount for which the carrier would otherwise be liable and is valid only where another rate is offered carrying liability without limit as to amount. The Merauke, 31 Fed. 2nd, 974. To the same effect are Kilthau v. International Mercantile Marine Co., supra, and The Carso, 1932 A. M. C. 1236. The libellant's argument is that the present case is governed by these authorities and that the clause making invoice value the measure of damages is void because there was no choice of rates, one with the clause and one without it.

There is a substantial difference between an agreement that damages shall be adjusted on the basis of invoice value and an agreement that in case of damage no value higher than the invoice value shall be allowed. The latter is a strict limitation agreement, operative only in favor of the

carrier who may always disregard its presence and show that the market value at destination was less than the invoice value and take advantage of that fact. The former is not a limitation clause at all but is a provision fixing a new measure of damages. In instances where the market price of the commodity drops between the time of shipment and the time of arrival at destination, the clause may work out to the benefit of the shipper and the detriment of the carrier. The difference was noted in the Merauke case and in the Kithau case, and the intimation in both opinions is that a provision for computing damages by reference to [fol. 255] invoice value is reasonable and valid without the offer of an alternative rate bearing unlimited liability.

The fact is that such a clause is not unreasonable or offensive to public policy and on principle should be treated as valid. It does not place an artificial or arbitrary value on the goods. It guards the parties against fluctuations in the market while the goods are in transit. It furnishes a ready and convenient standard for measuring the loss in case of damage and tends to promote prompt settlements by leaving no room for extravagant claims of market value at destination. As already observed, it is not exclusively in the interest of the carrier but may frequently confer benefit on the shipper.

There is abundant authority for the proposition that the clause as it stands is valid. For years the cases have been to the effect that a clause in a bill of lading that loss shall be computed on the basis of the invoice price of the goods is valid, although no alternative rate was tendered the shipper or other special consideration given. Coleman v. New York, New Haven & Hartford R. Co., 215 Mass. 45; Fahey v. Baltimore & Ohio R. Co., 139 Md. 161; Davis v. Zimmern, 211 Ala. 63; Grubbs v. Atlantic Coast Line R. Co., 101 S. C. 210; Brockman Co. v. Missouri Pacific R. Co., 195 Mo. App. 607; Denver, etc. R. Co. v. Peterson, 59 Colo. 125; Wallingford v. Atchison, etc., R. Co., 101 Kans. 544; Bowman-Krantz Lumber Co. v. Bush, 104 Nebr. 165; Shaffer v. Chicago, etc. R. Co., 21 I. C. C. 8. See also Duplan Silk Co. v. Lehigh Valley R. Co., 223 Fed. 600, in which Judge Lacombe said that such a clause was "lawfully included" in the bill of lading. The Duplan case incidentally is an authority for the validity of both clause 3 [fol. 256] and clause 11 in the present case. An equivalent

clause, that damages shall be based on value of the goods at time and place of shipment, is likewise held valid. Inman & Co. v. Seaboard Air Line R. Co., 159 Fed. 960; Springfield Co. v. Norfolk & Western R. Co., 260 Fed. 254; The Asuarca, 13 Fed. 2nd, 222; Spada v. Pennsylvania R. Co., 86 N. J. L. 187. See also Phoenix Insurance Co. v. Erie Transportation Co., 117 U. S. 312, 322, where the Supreme Court said obiter that a provision in a bill of lading making the value of the goods at the time and place of shipment the measure of the carrier's liability was valid, although in the absence of such a clause the value at the place of destination would govern the damages. In several other cases, clauses to the same effect as paragraph 3 and paragraph 11 in this case have been construed and applied, their validity having apparently been taken for granted. Western Transit Co. v. Leslie, 242 U. S. 448; Pennsylvania R. Co. v. Olivit Brothers, 243 U. S. 574; Gulf, etc. R. Co. v. Texas Packing Co., 244 U. S. 31. See also The Oneida, 128 Fed. 687. And the plain inference from Chicago, etc. R. Co. v. McCaull-Dinsmore Co., 253 U. S. 97, is that a provision in a bill of lading fixing the carrier's liability at the value of the goods at place and time of shipment is unobjectionable except in cases falling within the first or second Cummins Amendments or some other applicable statute. (49 U. S. C. A., sec. 20 (11).)

I have not overlooked Straus v. Canadian Pacific R. Co., 254 N. Y. 407. That case seems to support the libellant's argument, but it is opposed to the great weight of authority.

In my opinion clause 11 in the bill of lading, requiring that losses be adjusted according to the invoice value of [fol. 257] the shipment, is a reasonable and valid provision, and the commissioner erred in not giving effect to it. The exceptions relative to the measure of damages will therefore be sustained.

2. The construction of the clause is the next question. As an original matter, it might be urged that the libellant ought to recover the invoice value of the damaged goods; that if twenty per cent. of the shipment were lost, the damages should be computed at twenty per cent. of the invoice value of the whole shipment, as under a valued policy of marine insurance. But the effect given to similar clauses in the past has been that the damages are the difference between the invoice value of the entire shipment and the

market value at time and place of destination of the goods in their actual condition. Gulf, etc. R. Co. v. Texas Packing Co., supra; Duplan Silk Co. v. Lehigh Valley R. Co., supra; The Oneida, supra, at pages 692-693. That rule will be followed here. "Invoice value" refers to commercial invoice and not to consular invoice. The libellant is also entitled to freight if prepaid.

3. The commissioner found that the cherries were in good order and condition when received by the carrier. He also made findings as to the quantity of cherries lost or damaged in transit. His findings on these matters are supported by the preponderance of the proof, and the exceptions relative to them will be overruled.

4. Interest on the damages was allowed by the commissioner, except for a period of three years and five months, during which the libellant was taking depositions of wit- [fol. 258] nesses in distant places. The Commissioner held that this was the only delay that was fairly chargeable to the libellant. The claimant has excepted, insisting that no interest should have been allowed. Interest is discretionary in admiralty. The Scotland, 118 U. S. 507. Upon a review of the steps in this protracted litigation, I am satisfied that the commissioner's ruling on interest was fair to both parties. The exception will be overruled.

As already indicated, the exceptions to the measure of damages will be sustained. The other exceptions will be overruled. The parties may submit memoranda as to the computation of damages, pointing out the proof as to invoice value of the entire shipment, market value of the goods at destination in their damaged condition, and expenses incurred.

(Sgd.) Robert P. Patterson, U. S. D. J.

January 30, 1933.

[fol. 259] In United States District Court

[Title omitted]

Order on Exceptions—Feb. 21, 1933

An interlocutory decree having been heretofore duly entered in this cause on the 20th day of October, 1927, order-

ing, adjudging and decreeing that the libellant recover of the steamship "Ansaldo San Giorgio I" the amount of its damages arising out of the matters set forth in the libel and referring it to John E. Morrissey, Esq., Commissioner, to ascertain, compute and report the amount of damages suffered by said libellant, and the said Commissioner having filed his report on the 17th day of October, 1932, fixing the amount of said libellant's damages at the sum of $17,075.42, together with interest thereon from September 2, 1920, to October 17, 1932, less a penalty of three years and five months, amounting to the sum of $8,931.57, making a [fol. 260] total of $26,006.99, and exceptions to the report of said Commissioner having been filed by the claimant, and on consideration the First, Second and Third exceptions having been sustained, and the other exceptions having been overruled;

Now, on motion of Loomis & Ruebush, proctors for the claimant, it is

Ordered that the First, Second and Third exceptions to the report of the Commissioner John E. Morrissey filed herein be and the same hereby are sustained;

And on motion of Bigham, Englar, Jones & Houston, proctors for the libellant, it is

Ordered that the Fourth, Fifth, Sixth, Seventh and Eighth exceptions to the report of the Commissioner John E. Morrissey, Esq., filed herein be and the same hereby are overruled and the report of the Commissioner filed herein be and hereby is confirmed in respect to the matters contained therein relating to the Fourth, Fifth, Sixth, Seventh and Eighth exceptions.

Ordered that the parties may submit memorandums as to the computation of damages on the basis of the proof now in evidence in this cause to the Hon. Robert P. Patterson, United States District Judge.

Robert P. Patterson, U. S. D. J.

[fol. 261] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AS TO AMOUNT OF FREIGHT—March 9, 1933

It is stipulated and agreed by and between the parties hereto that the prepaid freight on the shipment of 466

barrels of cherries in brine was the sum of £200 Sterling, which at the highest rate of exchange obtaining on July 6, 1920, is equivalent to $789.50.

It is further stipulated and agreed by and between the parties hereto that this stipulation shall be substituted for, and take the place of, the one heretofore filed with the Court dated March 6, 1933, which shall be deemed null and void and withdrawn accordingly.

Dated, New York, March 9th, 1933.

Bigham, Englar, Jones & Houston, Proctors for Libellant. Loomis & Ruebush, Proctors for Claimant.

[fol. 262] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

A-82-357

[Title omitted]

MEMORANDUM BY PATTERSON, D. J.

PATTERSON, D. J.:

The libellant has not shown, as to any of the three shipments, that the invoice value of the goods plus freight was greater than the actual arrived value. The libel will therefore be dismissed, but without costs.

(Sgd.) Robert P. Patterson, U. S. D. J.

March 14, 1933.

[fol. 263] IN UNITED STATES DISTRICT COURT

A-82-357

Present: Hon. Robert J. Patterson, District Judge.

THE RHEINSTROM BROS. Co., Libellant,

against

S. S. "ANSALDO SAN GIORGIO I," SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant

FINAL DECREE—March 23, 1933

An interlocutory decree having heretofore been duly entered in this cause, to wit, on the 20th day of October, 1927, referring it to John E. Morrissey, Esq., Commis-

sioner, to ascertain, compute and report the amount of the damages suffered by the libellant, and the said Commissioner having filed his report on the 17th day of October, 1932, fixing the amount of said damages at the sum of $26,006.99, and exceptions to said report having been filed by claimant, and, on consideration, the first, second, and third exceptions having been sustained and the fourth, [fol. 264] fifth, sixth, seventh and eighth exceptions having been overruled, and the report of the Commissioner confirmed in respect to the matters contained therein relating to the fourth, fifth, sixth, seventh and eighth exceptions by an order entered herein on the 21st day of February, 1933, and memoranda having been submitted to the Honorable Robert P. Patterson, United States District Judge on the computation of damages herein and it appearing that under the opinion dated January 30, 1933, the libellant has established no recoverable damage, and the Court after due deliberation having rendered its decision dismissing the libel herein, without costs; and it further appearing that the amount of the said Commissioner's fee, endorsed upon the Commissioner's report filed herein, is $1,500, and no exceptions having been filed to the amount of said fee,

Now, on motion of Bigham, Englar, Jones & Houston, proctors for libellant, it is

Ordered, adjudged and decreed that the libel herein be, and the same hereby is, dismissed, without costs, and it is further

Ordered that the Commissioner's fee is hereby fixed and confirmed in the amount of $1,500.

Robert P. Patterson, U. S. D. J.

[fol. 265] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL AND ALLOWANCE

SIRS:

Please take notice that The Rheinstrom Brothers Company, libellant in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Sec-

ond Circuit from the final decree entered herein on the 23rd day of March, 1933, and from each and every part of said decree.

Dated May 31, 1933.

Yours, etc., Bigham, Englar, Jones & Houston, Proctors for Libellant, No. 64 Wall Street, New York, N. Y.

To Messrs. Loomis & Ruebush, Proctors for Claimant, 70 Pine Street, New York, N. Y.

The foregoing appeal is hereby allowed.

Dated, New York, May 31, 1933.

Alfred C. Coxe, U. S. D. J.

[fol. 266] In United States District Court, Southern District of New York

A-82-357

[Title omitted]

Assignment of Errors

The libellant hereby assigns error to the findings, decision and decree of the District Court in the above entitled action, as follows:

First. The Court erred in entering a decree in favor of the claimant dismissing the libel.

Second. The Court erred in failing to grant a final decree to the libellant against the S. S. "Ansaldo San Giorgio I" for the amount of damages reported by the Commissioner.

Third. The Court erred in holding that a provision for computing damages by reference to invoice value, is reasonable and valid without offer of an alternate rate bearing unlimited liability.

Fourth. The Court erred in holding that a bill of lading clause providing for the computation of damages by refer-
[fol. 267] ence to invoice value without the offer of an alternative rate bearing unlimited liability, is not unreasonable or against public policy.

Fifth. The Court erred in failing to hold clause 11 of the bill of lading invalid as unreasonable and contrary to public opinion because there was no evidence that there was a choice of rates available to the shippers.

Sixth. The Court erred in failing to hold that clause 11 of the bill of lading was an attempt to cut down the amount for which the carrier would otherwise be liable without offering the shippers another rate carrying liability without limit as to amount.

Seventh. The Court erred in failing to hold that the claimant has the burden of proving that a choice of rates was available to the shippers.

Eighth. The Court erred in holding that the existence of alternative rates is not essential to the validity of an agreed valuation clause.

Ninth. The Court erred in sustaining claimant's exceptions relative to the measure of damages.

Tenth. The Court erred in holding that under the decision in this case the libellant has sustained no recoverable damages.

Eleventh. The Court erred in failing to hold that the libellant is entitled to have its damages computed upon the basis of the difference between the sound market value of the damaged goods at destination at the time delivery [fol. 268] should have been made, and the value at destination of the damaged goods in their arrived conditon.

Twelfth. The Court erred in holding that, under clause 11 of the bill of lading, the libellant's damages are the difference between the invoice value of the entire shipment and the arrived market value at time and place of destination of the entire shipment, both damaged and undamaged.

Thirteenth. The Court erred in failing to hold that clause 11 is void upon grounds of public policy, in that it permits the carrier, in ascertaining the amount for which he is liable, to charge against the invoice value of the entire shipment the amount realized in a foreign market for the entire shipment, damaged and undamaged, thereby giving the carrier the full benefit of the foreign market value, which opportunity is expressly denied to the shipper.

Fourteenth. The Court erred in failing to hold that the liability of the claimant under clause 11 arises separately for each unit of merchandise damaged.

Fifteenth. The Court erred in failing to hold that clause 11 should be applied distributively upon each article of a shipment that is lost and damaged, for which the carrier is liable.

Sixteenth. The Court erred in failing to hold that under clause 11 the carrier is liable for the difference between the value of the damaged goods, over all charges and expenses, and the invoice value of the damaged goods.

Bigham, Englar, Jones & Houston, Proctors for Libellant.

[fol. 269] In United States Circuit Court of Appeals for the Second Circuit

[Title omitted]

Order Overruling Claimant's Objections to Printing of Exhibits

A proposed transcript of record having been served upon counsel for the claimant on the 28th day of July, 1933, and the claimant having raised objections to the inclusion therein of the following matters:

Translations of invoices (referred to in the proposed transcript of record as Libellant's Exhibit 6, pp. 205-208);

Consular invoices (referred to in the proposed transcript of record as Libellant's Exhibit 4, pp. 167, 178);

Copies of letters exchanged between counsel, annexed to a stipulation entered into between proctors for the respective parties hereto (referred to in the proposed transcript of record as Libellant's Exhibit 4a, pp. 179-195 inclusive);

Statement showing docket entries and a record of other [fol. 270] proceedings had in this case (referred to in the proposed transcript of record as Libellant's Exhibit 7, pp. 209-211 inclusive);

and the said objections having been argued before Judge Martin T. Manton, in chambers, on September 8, 1933, and

the Court having overruled all of the said objections, and the Court having further ruled that the transcript of record herein be printed in accordance with the said proposed transcript of record submitted to counsel as aforesaid, a copy of which was produced upon the hearing above re-referred to, without deletion of any part of the contents thereof.

It is ordered that claimant's objections be, and the same hereby are, overruled in all respects, and it is further

Ordered that the record on appeal in this case be printed in accordance with the said proposed transcript of record heretofore served upon counsel for the claimant.

Dated, New York, September 11th, 1933.

Manton, U. S. C. J.

[fol. 271] In United States District Court, Southern District of New York

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter.

Dated, New York, September 20th, 1933.

Bigham, Englar, Jones & Houston, Attorneys for Appellant. Loomis & Ruebush, Attorneys for Appellee.

[fol. 272] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 273] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1933

No. 179

Argued Jan. 23, 1934. Decided Sept. 17, 1934

THE RHEINSTROM BROTHERS COMPANY, Libelant-Appellant,

v.

The Steamship ANSALDO SAN GIORGIO I, SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

From a final decree dismissing its libel in rem to recover cargo damage from the steamship Ansaldo San Giorgio I, the libelant appeals. Societa Nazionale di Navigazione, claimant of the vessel, is the appellee. Decree reversed.

For opinion below, see 3 F. Supp. 579.

Bigham, Englar, Jones & Houston, of New York City (D. Roger Englar, Henry N. Longley and F. Herbert Prem, all of New York City, of counsel), for appellant.

Loomis & Ruebush, of New York City (Homer L. Loomis and Thomas F. Peterson, Jr., both of New York City, of counsel), for appellee.

SWAN, Circuit Judge:

This suit was begun in March, 1922, to recover for damage in transit to three lots of cherries in brine shipped from Italian ports in July, 1920. An interlocutory decree in favor of the libelant was affirmed by this court without opinion in June, 1928. Rheinstrom Bros. Co. v. Ansaldo San Giorgio I, 26 F. (2d) 1016. A writ of certiorari was denied in Societa Nazionale di Navigazione v. Rheinstrom Bros. Co., 278 U. S. 633, 49 S. Ct. 31, 73 L. Ed. 550. The case then went to a commissioner to compute the recoverable damages. Hearings before the commissioner were begun in December, 1930. He filed his report in October,

1932, finding the libelant's damages, including interest, to be $26,006.99. Upon exceptions to his report, the District Court sustained the commissioner's findings of fact, but concluded that by reason of a certain clause of the bill of lading no damages were recoverable. On March 23, 1933, a decree was entered dismissing the libel without costs. The libelant appealed. Thus this venerable controversy has plodded its weary way to this court for a second time. Comment upon the lapse of years since the cherries in question began their voyage would be superfluous.

Before coming to the merits of the appeal, we must consider a contention by the appellee that no appeal will lie from the decree as entered because it contains a recital that it was made on motion of proctors for the libelant. Numerous authorities are cited to the effect that a party cannot appeal from an order entered on his own motion. Marks v. Leo Feist, 8 F. (2d) 460, 462 C. C. A. 2); United States v. Babbitt, 104 U. S. 767, 768, 26 L. Ed. 921; Raymond v. Tiffany, 115 App. Div. 350, 352, 100 N. Y. S. 807; Munson Realty Co. v. Melrose Bond & Mortgage Corp. 232 App. Div. 832, 834, 248, N. Y. S. 614; McAlpin v. Stoddard, 54 Misc. 647, 650, 105 N. Y. S. 9. But it is clear from the record that this was not a decree to which the libelant consented in any such sense as to bar an appeal. A consent decree is an agreement of the parties under the sanction of the court as to what the decision shall be. See Kelly v. Town of Milan, 21 F. 842, 865 (C. C. W. — Tenn.); Hodg- [fol. 274] son v. Vroom, 266 F. 267, 268 (C. C. A. 2); Wilson v. Haber Bros., 275 F. 346, 347 (C. C. A. 2); Davey Tree Expert Co. v. Frost & Bartlett Co., 300 F. 680, 681 (D. C. Conn.). Here the record shows that the entry of the final decree merely carried into effect the court's previous decision on a litigated issue. The appeal is properly here.

On the merits, the decision turns upon the validity of a provision in the bills of lading reading as follows:

"11. In the event of claims for loss, damage or short delivery, the same shall be adjusted on the basis of the invoice value of the entire shipment, adding expenses necessarily incurred."

The commissioner found a short delivery of 45 barrels, damage of 100 per cent. to 117 barrels, and additional dam-

age equivalent to the loss of 419 barrels, making a total loss of 581 barrels. Since there was no proof that the shipper was offered an alternative freight rate under which the carrier's liability would be unlimited, he held the above-quoted clause of the bills of lading to be invalid and took as the measure of damages the market value of 581 barrels of sound cherries at the port of destination on the day when delivery should have been made. The District Judge, however, concluded that the clause was valid, and directed that the damages should be computed by determining the amount by which the invoice value of the entire shipment, plus freight, exceeded the actual arrived value of the entire shipment. Since the libelant did not prove as to any of the three shipments that the invoice value of the goods plus freight was greater than the actual arrived value, the libel was dismissed.

In the absence of a valid stipulation to the contrary, a common carrier's liability for negligent loss or injury of goods in transit is measured by the market value of the goods at destination, in the condition in which they should have arrived, on the date when they should have been delivered. New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 616, 13 S. Ct. 444, 37 L. Ed. 292; St. Johns N. F. Shipping Corp. v. S. A. Companhia Geral, etc., 263 U. S. 119, 125, 44 S. Ct. 30, 68 L. Ed. 201. It is equally well settled that the carrier may not limit its liability for negligence to a stipulated value for the goods unless the shipper is offered a choice between limited and unlimited liability at alternative rates. Hart v. Penn. R. Co., 112 U. S. 331, 5 S. Ct. 151, 28 L. Ed. 717; Union Pac. R. Co. v. Burke, 255 U. S. 317, 41 S. Ct. 283, 65 L. Ed. 656. In The Merauke, 31 F. (2d) 974, this court, following the decision in Kilthau v. Int. Merc. Marine Co., 245 N. Y. 361, 157 N. E. 267, applied the principle to invalidate a stipulation which purported to limit liability to the invoice cost of the goods. The Merauke involved a true limitation clause, which could inure to the benefit of the carrier only. We intimated that a different result might perhaps obtain in the case of a mutual agreement to accept the invoice cost of the damaged goods as the measure of their value in sound condition at port of destination. A similar intimation may be found in the Kilthau Case. Such an agreement may be of advantage to either party; it guards against fluctuations in the market while the goods are in transit, furnishes a convenient stand-

ard for measuring the damage in case of injury or loss, and tends to promote prompt settlements by excluding extravagant claims of market value at destination. As the District Judge pointed out in the opinion below, there is substantial authority, although not unanimous, in the state courts for holding such an agreement valid even though there is no reduced freight rate to support it. In the federal courts the question does not seem to have been squarely decided; nor do we find it necessary to decide it in the case at bar.

The clause under consideration does not substitute invoice value for market value of the goods lost or injured by the carrier's negligence. It provides that claims "shall be adjusted on the basis of the invoice value of the entire shipment." This means, as the appellee contends and the District Court held, that the invoice value of the entire shipment, not the invoice value of the lost or damaged goods, is to constitute the basis for computing whether damages have been sustained by the shipper. Thus, if there were a short delivery of 50 cases out of a shipment of 100 cases, but the market value at port of destination of the goods delivered was equal to the invoice value of the 100 cases, plus freight, the carrier would pay nothing for its negligent loss of half the shipment; and a similar result would obtain if half the cases were damaged but the market value of all the goods, damaged and undamaged, was greater than their invoice value plus freight. Indeed, in the case at bar, although a substantial part of the cherries were lost or dam- [fol.275] age by the carrier's negligence, it escaped liability because the arrived market value of the cherries in each shipment exceeded the invoice value of the entire shipment plus prepaid freight. A contract which would thus exempt a carrier from liability for losses resulting from its negligence is so unreasonable that it must be held contrary to public policy and void. None of the cases relied upon by the appellee involves a clause purporting to measure damages by the difference between the invoice value of the entire shipment and the market value of the goods delivered when part of the shipment has been lost or damaged; and no decision has been found sustaining the validity of such a clause. Dicta by Judge Addison Brown in Pearse v. Quebec S. S. Co., 24 F. 285, 286 (D. C. S. D. N. Y.), expressly deny the validity of the contract if it be interpreted in this manner. See, also, Boston & M. R. R. v.

Piper, 246 U. S. 439, 38 S. Ct. 354, 62 L. Ed. 820, Ann. Cas. 1918E, 469. In the opinion below, the District Judge stated that he was following the rule of damages applied under analogous clauses in Gulf, C. & S. F. R. Co. v. Texas Packing Co., 244 U. S. 31, 37 S. Ct. 487, 61 L. Ed. 970, Duplan Silk Co. v. Lehigh Valley R. Co., 223 F. 600 (C. C. A. 2), and The Oneida, 128 F. 687 (C. C. A. 2). We do not so read these authorities. In the Texas Packing Company Case the shipment consisted of five cars of dressed poultry. As the damage arose from a failure to re-ice en route, it seems probable that the entire shipment was injured, and we find nothing in the opinion to indicate that, in case of damage to only part of a shipment, the damages are to be measured by the difference between the invoice value of the entire shipment and the arrived market value of the goods damaged and undamaged. This is likewise true of the opinions in the other two cases cited.

For the foregoing reasons we hold that clause 11 is invalid. Accordingly the decree dismissing the libel is reversed, with costs, and it is ordered that the libelant recover damages as found by the commissioner.

[fol. 276] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court-rooms in the Post Office building in the City of New York, on the 24th day of September, one thousand nine hundred and thirty-four.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

RHEINSTROM BROTHERS COMPANY, Libellant-Appellant,

vs.

SS ANSALDO SAN GIORGIO, SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed with costs, and with directions that the libellant recover damages as found by the Commissioner.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 277] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Rheinstrom Brothers Company vs. SS Ansaldo San Giorgio. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Sep. 24, 1934. William Parkin, Clerk.

[fol. 278] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 277, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Rheinstrom Brothers Company, Libellant-Appellant, against SS Ansaldo San Giorgio, Societa Nazionale Di Navigazione, Claimant-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 29th day of October, in the year of our Lord one thousand nine hundred and thirty-four, and of the Independence of the said United States the one hundred and fifty-ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.

[fol. 279] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1934

No. 521

SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant of the Steamship Ansaldo San Giorgio I, Her Engines, Boilers, etc., Petitioner (Claimant-Appellant Below),

against

THE RHEINSTOM BROTHERS CO., Respondent (Libellant-Appellee Below)

Subject to the approval of the Court, it is hereby stipulated and agreed by and between counsel for the respective parties hereto that the printing of the Transcript of Record, filed in the Clerk's office of this Court by the claimant herein on its appeal from the interlocutory decree entered by the libellant upon the decision of the District Court holding the claimant liable for the amount of libellant's damages, which Transcript of Record was offered by the libellant as an exhibit in the proceedings before the Special Commissioner appointed to ascertain the amount of libel-[fols. 280 & 281] lant's damages, and a true copy of which was certified to the Clerk of this Court by the Clerk of the United States Circuit Court of Appeals for the Second Circuit as an exhibit herein, may be omitted from the Transcript of Record to be filed on the petitioner's application for a writ of certiorari, and that for the purpose of further proceedings on certiorari in the United States Supreme Court or to procure therefrom a writ of certiorari said Transcript of Record on the first appeal may be referred to by the Court, and that counsel for either party may in their briefs or upon the argument of further proceedings on certiorari refer to any matter contained in the transcript of record on the first appeal in this case, and that the said Transcript of Record on the first appeal may be handed to the Court upon the presentation of the application for certiorari, and that counsel for either party may in their briefs, or upon the argument of the pending appeal refer to any matter contained in the record on the first appeal in this case.

Dated New York, November 8th, 1934.

Homer L. Loomis, Counsel for Petitioner. D. Roger Englar, Counsel for Respondent.

[fol. 282] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 3, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,149. U. S. Circuit Court of Appeals, Second Circuit. Term No. 521. Steamship "Ansaldo San Giorgio I," Societa Nazionale Di Navigazione, Claimant, Petitioner, vs. The Rheinstrom Brothers Company. Petition for a writ of certiorari and exhibit thereto. Filed November 7, 1934. File No. 521, O. T., 1934.